7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 35

LOUIS HOUCK AND MARY H. G. HOUCK, HIS WIFE; CHARLES J. JUDEN, AND C. G. COX, PLAINTIFFS IN ERROR,

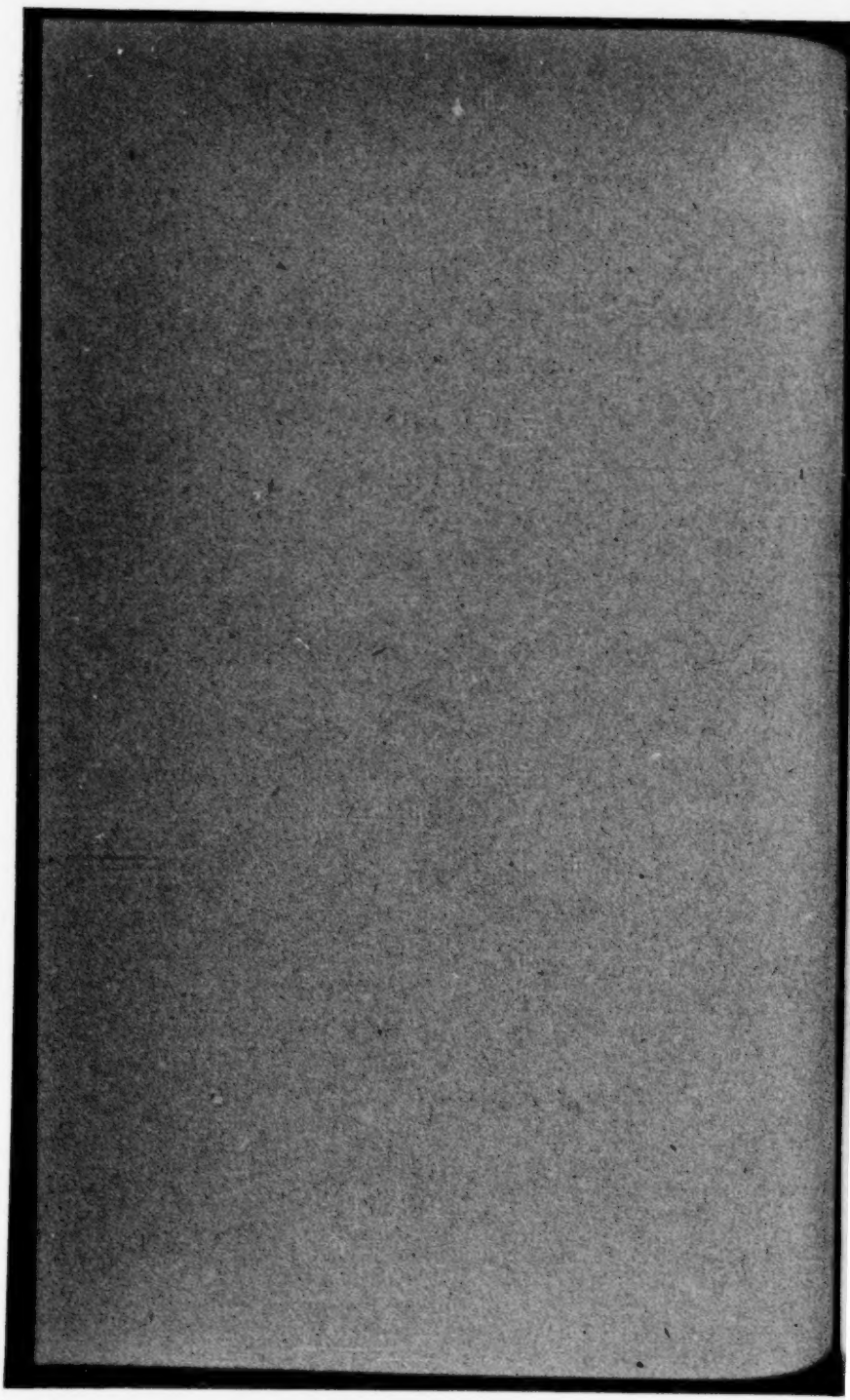
vs.

THE LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED DECEMBER 10, 1913.

(23,960)



(23,960)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 308.

LOUIS HOUCK AND MARY H. G. HOUCK, HIS WIFE; CHARLES J. JUDEN, AND C. G. COX, PLAINTIFFS IN ERROR,

vs.

THE LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a In the Supreme Court of Missouri.

LOUIS HOUCK et al.
vs.
LITTLE RIVER DRAINAGE DISTRICT et al.

TRANSCRIPT OF RECORD.

1 In the Supreme Court of the State of Missouri.

No. 16546.

LOUIS HOUCK et al., Appellants (Plaintiffs in Error),
vs.
THE LITTLE RIVER DRAINAGE DISTRICT, Respondents (Defendants in Error).

Præcipe.

To J. D. Allen, clerk of the Supreme Court of Missouri:

In obedience to the command of the writ of error issued in said cause from the Supreme Court of the United States to the Supreme Court of the state of Missouri, on November 10th, 1913, you will please send to the Supreme Court of the United States, as commanded in said writ, the following record of the entries, proceedings and matters in said cause, to-wit:

(1). Said writ of error.

(2). Your return to same.

(3). The citation issued in said cause.

(4). Acknowledgement of service thereon by the attorneys for said defendants in error.

(5). Record entry of your court showing the filing and date of filing of the certified copy of judgment in said cause entered by the Circuit Court of Cape Girardeau county, Missouri, together with the filing and date of filing of the order of said Circuit Court granting the appeal in said cause from the said Circuit Court to the Supreme Court of the state of Missouri.

(6). The certified copy of said judgment and order granting appeal.

(6½). Motion to advance said cause on Docket of Supreme Court of Missouri together with acknowledgment of service of copy thereof on Appellants.

(7). Order of the Supreme Court of Missouri advancing said cause on the docket.

(8). The complete abstract of the record filed in said cause.

(9). The order of the Supreme Court of Missouri showing the submission of said cause to said Supreme Court.

(10). The judgment and opinion of Division No. 1 of the Supreme Court of Missouri duly rendered in said cause.

(11). Order of the Supreme Court of Missouri showing the filing of appellants' motion to transfer said cause from said Division No. 1 to the Supreme Court en Banc.

(12). The said motion to transfer to the Court en Banc.

(13). The order of the Supreme Court of Missouri that said cause be transferred to the Court en Banc.

(14). Order of the Supreme Court of Missouri showing the submission of the said cause to the said Court en Banc.

(15). Judgment and opinion of said Court en Banc per curiam (since the Court en Banc adopted the same opinion rendered by said Division No. 1, (which is required above to be set forth in full) it will be sufficient here to make apt reference to the said opinion of Division No. 1, so as to obviate the necessity of printing this opinion twice.)

(16). Order of the Supreme Court of Missouri filing appellants' motion for re-hearing of the said cause.

(17). The said motion for re-hearing.

(18). Order of the Supreme Court of Missouri overruling said motion for re-hearing.

(19). Order of the Supreme Court of Missouri showing presentation to the Honorable Henry Lamm, chief justice of the Supreme Court of the state of Missouri, of the following matters in said cause, to-wit: a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of Missouri, together with an assignment of errors committed by said Missouri Supreme Court, a writ of error from the United States Supreme Court to the Missouri Supreme Court, a citation directed to the respondents (defendants in error) citing them to appear at a Supreme
2 Court of the United States in not exceeding 30 days from the date of the citation; also appellants' (plaintiffs in error) bond in the sum of $1000.00, and showing the filing of said petition and assignment of errors, the allowance of said writ of error, the signing of said citation and the approval and filing of said bond.

(20). The said petition for writ of error in said cause.

(21). The said assignment of errors in said cause.

(22). The said bond in said cause.

Very respectfully yours,

LOUIS HOUCK,
MARY H. G. HOUCK,
CHAS. J. JUDEN,
C. G. COX,
Appellants (Plaintiffs in Error).
GIBONEY HOUCK AND
By DAVIS & HARDESTY,
Their Attorneys.

Service of a true copy of the foregoing praecipe is hereby acknowledged this November 17th, 1913.

R. B. OLIVER,
R. B. OLIVER, JR.,
ALLEN L. OLIVER,
Attorneys for Respondents (Defendants in Error).

[Endorsed:] In the Supreme Court of Missouri. Louis Houck et al., appellants (Plaintiffs in Error), vs. Little River Drainage District, respondents (Defendants in Error). Præcipe for Record to be sent to U. S. Supreme Court. Filed Nov. 19th, 1913. J. D. Allen, Clerk Supreme Crt. Mo.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea in the cause of Louis Houck and Mary H. G. Houck, his wife, John Job, Louis Keller, C. F. W. Daume, Joseph Schaeffer, Alvin Feuerhahn, John Eggimann, Charles J. Juden, C. G. Cox, Louisa Wessell and Herman Daume, Appellants, vs. Little River Drainage District, John H. Himmelberger and George S. Hanford, respectively president and secretary of the Board of Supervisors said District, A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, members of said Board; Fred Govert and Clarence L. Grant, respectively Clerk of the County Court and Collector of Revenue of Cape Girardeau County, Missouri, Respondents, No. 16546, which is in the said Supreme Court before you (being the highest court of law or equity in said State wherein a decision could be had in said cause) at the October, 1912 term thereof (final judgment having been rendered February 12th, 1913 and Appellants' motion for rehearing having been overruled March 1st, 1913) a manifest error hath happened to the great damage of Appellants Louis Houck, and Mary H. G. Houck, his wife, Charles J. Juden and C. G. Cox, as by their complaint appears;

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, distinctly and openly under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington D. C., not exceeding thirty days from and after the date of the citation in said cause, in the said Supreme court, to be then and there held; that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 10th. day of November, A. D. 1913. Issued at office in the City of Jefferson with the Seal

of the District Court of the United States for the Central Division of the Western District of Missouri, dated as aforesaid.

[Seal of the United States District Court of Missouri. Central Division, Western District.]

JOHN B. WARNER,
Clerk of United States District Court,
Western District of Missouri,
Central Division.
By H. C. GEISBERG, *Deputy.*

Allowed by—

HENRY LAMM,
Chief Justice of the Supreme Court of the State of Missouri.

[Endorsed:] U. S. Circuit Court, Western District of Missouri, Central Division. Louis Houck et al., appellants, plaintiffs in error, vs. Little River Drainage District et al., respondents, defendants in error. Writ of Error to the Supreme Court of Missouri from the Supreme Court of the United States. Filed Nov. 10, 1913. J. D. Allen, Clerk of the Supreme Court of Missouri.

4 *Return to Writ.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of Missouri, at the City of Jefferson, Missouri, this the 22 day of Nov., A. D. 1913.

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

[Endorsed:] Filed Nov. 10, 1913. J. D. Allen, Clerk.

5 The United States of America to the Little River Drainage District; John H. Himmelberger and George S. Hanford, respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson and A. L. Harty, members of said Board; Fred Govert and Clarence L. Grant, respectively Clerk of the County Court and Collector of Revenue of Cape Girardeau County, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not ex-

ceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein Louis Houck and Mary H. G. Houck, Charles J. Juden and C. G. Cox are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, this 10 day of November in the year of our Lord One Thousand Nine Hundred and Thirteen.

HENRY LAMM,
Chief Justice.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, ss:

We hereby acknowledge due service of the within Citation, this 17th day of November A. D. 1913.

R. B. OLIVER,
R. B. OLIVER, JR.,
ALLEN L. OLIVER,
Attorneys for Defendant in Error.

[Endorsed:] In the Supreme Court of Missouri. Louis Houck, et al., Appellants, (Plaintiffs in Error), vs. Little River Drainage District et al., Respondents, (Defendants in Error). Citation. Filed Nov. 19, 1913. J. D. Allen, Clerk.

6 In the Supreme Court of Missouri, April Term, 1911.

Be it remembered, that on the 20th day of February, 1911, there was filed in this office a certified copy of the judgment and order allowing appeal from the Circuit Court of Cape Girardeau County Missouri, which said judgment and order allowing appeal are in words and figures as follows, to-wit:

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Civil Action.

Appearances:

Davis & Hardesty, Cape Girardeau, Mo., for Appellants.
Oliver & Oliver, Cape Girardeau, Mo., for Respondents.

Cape Girardeau County Circuit Court, January Adjourned Term, 1911, Monday, January 23rd, Seventh Day of Term.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; JOHN JOB, LOUIS Keller, C. F. W. Daume, Joseph Schafer, Alvin Fererhahn, John Eggiman, Charles J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Plaintiffs,

vs.

LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER and George S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, Members of said Board; Fred Goyert and Clarence Grant, Respectively Clerk of the County Court and Collector of the Revenue of Cape Girardeau County, Missouri, Defendants.

Civil Action.

Now again come the parties in the above entitled cause by their respective attorneys, and the court having seen and heard the plaintiffs' petition and the defendants' demurrer thereto, and the written stipulation of both plaintiffs and defendants concerning the issues involved in this cause, all of which have been heretofore sub-
7 mitted to the court with argument of counsel, and the court being now fully advised of and concerning all the matters and things so submitted doth sustain the demurrer of the defendants in all things; and in accordance with the conditions stated in said stipulation, plaintiffs decline to plead further, or to amend their petition herein.

Wherefore it is considered, ordered, adjudged and decreed by the court that plaintiffs' petition and cause of action herein be dismissed and for naught held, and that they take nothing by their writ, and that defendants go hence without day and have and recover of and from plaintiffs herein their costs in this behalf expended and have execution therefor.

8 Cape Girardeau County Circuit Court, January Adjourned Term, 1911, Tuesday, January 24th, Eighth Day of Term.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; JOHN JOB, LOUIS Keller, C. F. W. Daume, Joseph Schafer, Alvin Feuerhahn, John Eggiman, Charles J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Plaintiffs,

vs.

LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER and George S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, Members of said Board; Fred Goyert and Clarence Grant, Respectively Clerk of the County Court and Collector of the Revenue of Cape Girardeau County, Missouri, Defendants.

Civil Action.

Now come Louis Houck and Mary H. G. Houck, his wife, Charles G. Juden, John Job, Louis Keller, C. F. Daume, Alvin Feuerhahn, John Eggiman, C. G. Cox, Louisa Wessell, Herman Daume and Joseph Schafer, and first deposit with the Clerk of this Court the sum of Ten dollars as and for the docket fee required by law, for the Clerk of the Supreme Court of the State of Missouri. Plaintiffs next file their application and affidavit for an appeal of this cause to said Supreme Court, which application and affidavit the court finds to be sufficient, and, therefore, doth order that said appeal be, and the same is, hereby granted to said Supreme Court. It is further ordered that the appeal Bond be fixed at the sum of Two Thousand ($2000.00) Dollars, and that plaintiffs have ten days after the expiration of this term within which to file such bond.

STATE OF MISSOURI,
County of Cape Girardeau, ss:

I, H. L. Hoffmeister, Clerk of the Circuit Court in and for said County, hereby certify that the above is a true copy of the original Judgment of the court, and order granting appeal, etc., as full, true and complete as the same remains of record in my office, in Record Book W, pages 266 and 272 of the Circuit Court.

Witness my hand as Clerk, and the seal of said Court. Done at office in Jackson, Mo., this 24th day of February, 1911.

[SEAL.]

H. L. HOFFMEISTER,
Circuit Clerk.
ALMA RIEHNE, *D. C.*

On the back of the above certified copy of Judgment and order of Appeal is marked "Filed Feb'y 20, 1911. J. D. Allen, Clerk.

9 In the Supreme Court of Missouri, in Banc.

Afterwards, to-wit, on July 12th, 1911, the following proceedings were had in said cause and entered of record:

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAIN. DIST. et al., Respondents.

Come now the said respondents, by attorney, and file their motion to advance the hearing herein."

And afterwards, to-wit, on July 15th, 1911, the following further proceedings were had in said cause and entered of record:

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DIST. et al., Respondents.

Now at this day, the Court having considered and fully understood the respondent's motion to advance the hearing herein, doth order that the said motion be sustained and the said cause set for hearing at the October Term, 1911, in Division No. 1."

Which said motion for advancing the cause on the docket, is in words and figures as follows, to-wit:

10 In the Supreme Court of Missouri.

No. —.

LOUIS HOUCK, MARY H. G. HOUCK, His Wife; JOHN JOB, LOUIS Keller, C. F. W. Daume, Joseph Schaefer, Alvin Feuerhahn, John Eggimann, Charles J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Appellants,
vs.
THE LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Now on this day come the Respondents in the above entitled cause and move the Court to advance this cause on the docket of this Court, and for cause of said motion the Respondents say:

That under and by virtue of section 5538 R. S. 1909, the Board of Supervisors of The Little River Dra'nage District did levy a tax of 25 cents per acre upon each acre of land within said District.

That thereafter these appellants filed a petition in a court of competent jurisdiction seeking to enjoin and restrain the respondents from extending and collecting said tax.

That upon a final hearing of said petition by Judge Faris; of the Circuit Court of Cape Girardeau County, said petition was dismissed and judgment entered for respondents.

That thereupon this appeal was prosecuted to this Court.

That the only issue involved in said appeal is as to whether or not the Board of Supervisors of The Little River Drainage District had the legal right and authority to levy a flat tax of 25 cents per acre, upon each acre of land situated within The Little River Drainage District, under and by virtue of Section 5538 R. S. Mo. 1909, for the purpose of paying the expenses of organizing said Drainage District and for making the topographical and other surveys of said District and for the making of the plans for the draining and reclaiming of the lands in said District and for paying the expenses of assessing the benefits and damages to the lands in said District and for the necessary incidental expenses connected with said
11 District, before entering upon the main work of digging the ditches and building the levees and reclaiming the lands within said Drainage District.

That said section of the statute is comparatively new and has never been construed or passed upon by this honorable court. That it is the only authority under which Boards of Supervisors are authorized to levy a tax for meeting the expenses of organizing drainage districts and for making the surveys and plans for the reclamation thereof.

Respondents further state that the final determination of said issue is of vast importance to the State of Missouri and to every other drainage district organized and in course of organization under Article 1, Chapter 41 of the R. S. 1909, and is of especial importance and interest to the owners of about 500,000 acres of land situated in The Little Rive- Drainage District. That the Board of Supervisors of said Drainage District had been compelled to expend many thousands of dollars in organizing said District and in making topographical and other surveys of the lands in said District and in procuring and making the plans and details for the reclaiming of the lands within said District and in causing said lands to be assessed with the benefits and damages they will respectively receive after said lands have been reclaimed in accordance with said plans of drainage and for incidental expenses connected with said Drainage District.

That while many of the land owners in the respondent district have paid said taxes, there are other landowners, amongst whom are the appellants, who have neglected and refused to pay said tax, and there are still others who, it seems, are waiting upon the final judgment of this Court in this cause, before they will pay said tax. Such refusal and neglect and the pendency of this appeal has and will retard the progress and development of said District and thereby retard and obstruct the reclamation of the low lands embraced in said District.

Wherefore, the premises considered, Respondents pray that this

cause may be advanced on the docket and heard at such time during the October Term of this court as its business will permit.

Respectfully submitted,

OLIVER & OLIVER,
Attorneys for Respondent.

12 In the Supreme Court of Missouri.

No. —.

LOUIS HOUCK, MARY H. G. HOUCK, His Wife; JOHN JOB, LOUIS Keller, C. F. W. Daume, Joseph Schaefer, Alvin Feuerhahn, John Eggimann, Charles J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Appellants,

vs.

THE LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Messrs. B. F. Davis and B. C. Hardesty, practicing law under the firm name of Davis & Hardesty, and Attorneys of Record for Appellants in the above entitled cause:

You, and each of you are hereby notified that the Respondents will, on Thursday the 13th day of July, 1911, or as soon thereafter as they can be heard, present to the Supreme Court of Missouri a motion to advance the above entitled cause on the docket of said Court, when and where you may appear if you so elect.

OLIVER & OLIVER,
Attorneys for Respondents.

CAPE GIRARDEAU, MO., July 11, 1911.

Service of a copy of the foregoing motion to advance is hereby accepted on this *this* 11th day of July 1911.

DAVIS & HARDESTY,
Attorneys for Appellants.

(On the back of the above is marked "Filed July 12, 1911, J. D. Allen, Clerk.")

13 In the Supreme Court of Missouri, in Vacation.

And thereafter, to-wit, on September 11th, 1911, the Appellant filed its Abstract of Record in this Court, which said Abstract of Record is in words and figures as follows:

14 In the Supreme Court of the State of Missouri, October Term, 1911.

No. 16546.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; JOHN JOB, Louis Keller, C. F. W. Daume, Joseph Schaefer, Alvin Feuerhahn, John Eggimann, Charles J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Appellants,

vs.

LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER and George S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson and A. L. Harty, Members of said Board; Fred Goyert and Clarence L. Grant, Respectively Clerk of the County Court and Collector of Revenue of Cape Girardeau County, Missouri, Respondents.

Appeal from the Circuit Court of Cape Girardeau County, Missouri.

Appellants' Abstract of the Record.

15 Abstract of the Record.

(1) The Record Proper.

Plaintiffs instituted a suit against defendants in the Cape Girardeau Court of Common Pleas of said county, returnable to the November, 1910, term. Process was duly issued and served, and at the said November term, on the application of defendants, the venue was changed to the Circuit Court of said county, where the cause was tried at the January, 1911, term of said circuit court, the trial resulting in a judgment for defendants.

The papers hereinafter set out properly recited in the captions the names of the parties, the venue, and the trial term, all as above set forth, and were all duly signed by counsel for the respective parties. Hence the formal matters of caption and signatures are omitted. The amended petition was as follows:

Amended Petition.

"Plaintiffs state that they are owners in fee of the following real estate in Cape Girardeau County, Missouri, to-wit:" (Here follows a minute description of many thousand acres of land. As the description can subserve no useful purpose in this abstract, it will be omitted).

"Plaintiffs further state that at all times herein mentioned the county of New Madrid, in said state, has contained more of the lands of said Little River Drainage District than any other county; that on the 16th day of September, 1905, the majority in interest of the owners of land in said district instituted proceedings in the

circuit court of said New Madrid County for the purpose of organizing said district; that thereafter, said proceedings having been by change of venue removed from said circuit court of New Madrid County to the circuit court of Butler County, on the 30th day of November, 1907, at the instance of said majority, said proceedings ripened into a judgment rendered by said circuit court of
16 Butler County, in which judgment said Little River Drainage District was declared and decreed to be a public corporation of this state, and to embrace lands lying in the counties of Bollinger, Cape Girardeau, Scott, Stoddard, New Madrid, Dunklin and Pemiscit, including the above-described lands of these plaintiffs; that thereafter a certified copy of said judgment and other proceedings relating thereto was filed with the secretary of the State of Missouri and a like copy, together with a plat of said district filed with the county clerk of each of said counties, and that thereafter and at all times hereinafter mentioned, said Little River Drainage District has claimed to be a public corporation of this state and has acted as such, but plaintiffs deny that it was ever legally organized or ever acquired any corporate existence.

Plaintiffs further state that at all times hereinafter mentioned, defendants John H. Himmelberger and George S. Hanford were and still are respectively president and secretary of the board of supervisors of said district, and at all times hereinafter mentioned, defendants A. J. Matthews, S. P. Reynolds, C. W. Henderson and A. L. Harty were and still are members of said board, and that defendants Fred Govert and Clarence L. Grant were and still are respectively clerk of the county court and collector of the revenue of said Cape Girardeau County.

Plaintiffs further state that on the 3rd day of January, 1908, said board of supervisors employed a chief engineer and various assistant engineers, all constituting a board of engineers, which board proceeded straightway to make topographical and other surveys of the lands in said district, and in due time thereafter made to said board of supervisors a written report recommending a certain plan of drainage, which said plan of drainage was on the 18th day of November, 1909, adopted by said board of supervisors, and a copy thereof filed with the clerk of the circuit court of said county of Butler; that with the copy of said plan of drainage, was also
17 filed a petition of said board of supervisors, praying said Butler County Circuit Court to appoint three commissioners for viewing the various tracts of land in said district, and assessing benefits and damages which would accrue to such tracts by reason of the construction of the work outlined in said plan of drainage; that on the 23rd day of December, 1909, said Butler County Circuit Court granted said petition, and appointed said commissioners, who at once qualified as such, and proceeded with their said work, and are still engaged therein.

Plaintiffs further state that the avowed purpose, and the only possible legal purposes, for which said district was organized, was the protection of the lands in said district from a superabundance of water, such protection to be achieved by actual work of excava-

tion and construction; that plaintiffs have at all times herein mentioned been opposed to having their lands included in said drainage district, and so far as their interests are concerned, have at all said times been opposed to the entire scheme and system of drainage, and that all the proceedings relative to said drainage, whether performed or contemplated, are, so far as these plaintiffs are concerned, in invitum; that none of the said actual work of excavation or construction has ever been done, nor has any work of any character ever been done by or in behalf of said drainage district, whereby a particle of water in the entire district has been affected; that no benefits to any land in said district have accrued from the construction of the said drainage system, because such construction has never even been begun, and no benefits can possibly accrue to the lands of these plaintiffs or to any other lands in said district prior to the performance of some work of excavation and construction resulting in changing to some extent, the flow of water in said district; that all that has ever been done relative to such drainage consists of the various preliminary proceedings, above set forth,
and that all such preliminary proceedings have been con-
18 ducted not by these plaintiffs, or at their instance or request, but against their will, and by the majority in interest of the owners of land in said district, acting by and through the said district and its board of supervisors.

Plaintiffs further aver that the various tracts of land, lying in said district and including the lands of these plaintiffs vary in value; that none of the lands of these plaintiffs will be benefited either by the collection or disbursement of the flat tax, or by the carrying out of the proposed scheme of drainage; that a large portion of lands of said district, and in particular a large portion of the land of these plaintiffs, is by said district to be condemned for a right of way for ditches, channels and catch basins of the proposed system of drainage; that said district is proposing, under section 5500, Revised Statutes of Missouri for 1909, to bring large bodies of land, to-wit: — acres, lying in Bollinger and Stoddard counties, into said district, as an addition thereto, and that said district has instituted a suit in the said Circuit Court of Butler county, in that behalf.

And now plaintiffs aver the fact to be that the majority in interest, by and through said district and its board of supervisors, are seeking to enforce from the minority, including these plaintiffs, payment of a certain assessment made by said board of supervisors, called a tax, and levied by said board for the purpose of raising funds to pay expenses incurred by reason of said preliminary work and to pay other expenses hereafter to be incurred in further preliminary work; that said tax has been levied against every acre of land in said district, and in particular against all the said lands of these plaintiffs, as a flat or level tax at the rate of 25 cents per acre without regard either to the relative value of any of the various tracts in said district, or to the fact that no benefit will be rendered to any of said tracts either by the collection or expenditure of said tax, or by the carrying out of the proposed scheme of drainage,

or that other portions will be damaged, or that other por-
19 tions will be taken from these plaintiffs by condemnation,
as aforesaid, and without regard to the fact that said large addition of territory will, if added to said district, receive the benefit of any collection of said tax, without being charged with any part thereof. Plaintiffs further aver that [illegible], without regard to any of said matters, as aforesaid said board of supervisors, by resolution of March 21st, 1910, in substance and effect declared a special tax of 25 cents per acre to be by them levied and assessed as a level rate upon each and every acre of land lying in said district, for the purpose of raising money to pay the expenses of organizing said district, making surveys and plans, and paying expenses of assessing benefits and damages, and paying other incidental expenses made necessary for accomplishing the end and object of said district; that said board of supervisors, by their order of April, 1910, made on defendant Goyert, as clerk aforesaid, ordered and directed said Goyert, as such clerk to extend said tax as a separate claim upon the tax books of the County of Cape Girardeau, against all the land in Cape Girardeau county lying in said district and in particular against each and every acre of said land of these plaintiffs, and further ordered and directed that said tax was to be known as the "Little River Drainage Tax" and was to be extended upon said tax books for the year 1910, and to be collected in the same manner and time as county taxes are paid to the county treasurer; and in said order, said board declared such tax to be a lien upon the land assessed with same, to which lien, only the lien of the state for county, school and road taxes was to be paramount. Plaintiffs further state that a certified copy of said resolution and said order having been on the 25th day of April, 1910, filed with defendant Goyert, he thereupon promptly followed the directions of same and on May 31st, 1910, as such clerk, delivered to defendant Grant, collector, as aforesaid, the tax books with said Little River Drainage tax extended thereon, as directed, said tax books thus delivered, being
accompanied with a copy of said resolution and said order;
20 that defendant Grant is proceeding with the collection of said Little River Drainage tax in the same manner required by law for the collection of state, county and school taxes, and such of said Little River Drainage tax as may not be paid voluntarily, defendant Grant, as collector, threatens to collect by enforcing said lien, and seizing and selling the lands charged therewith, and in particular the said lands of these plaintiffs.

And plaintiffs further aver that said levy and assessment of said tax was made under an act entitled: "An act to amend 'An act to repeal sections 8251, 8252, 8253, 8259, 8260, 8261, 8262 and 8263 of chapter 122, article 3 of the Revised Statutes of Missouri, 1899, relating to swamp and overflowed lands, and to enact other sections in lieu thereof and in addition thereto, as follows: Sections 8251, 8253, 8253*a*, 8253*b*, 8253*c*, 8253*d*, 8259, 8259*a*, 8259*b*, 8260, 8261, 8262, 8263, 8263*a*, 8263*b*, 8263*c*, 8263*d*, 8263*e*, 8263*f*, 8263*g*, 8263*h*, 8263*i*, 8263*j*, 8263*k*, 8263*l*, 8263*m*, 8263*n*, 8263*o*; 8263*p*, 8263*q*, 8263*r*, with an emergency clause,' approved April 8th, 1905, by in-

serting additional sections, to be known as sections 8263*r*, 8263*s*, 8263*t*, 8263*u*, 8263*v*," approved June 1st, 1909; and appearing in the Revised Statutes of Missouri for 1909, as section 5538; that said act is unconstitutional and void, being in contravention of the following sections of the Constitution of the State of Missouri, to-wit: that it is in contravention of section 3, of Article 10, requiring all taxes to be for public purposes and to be uniform; Section 4 of Article 10 requiring all property to be taxed in proportion to its value; and Section 21 of Article 2 forbidding the taking of private property for public use without just compensation; Sections 11 and 12 of Article 10, limiting the amount of the aggregate rates of taxation; also Section 30 of Article 2, providing that no person shall be deprived of property without due process of law, and also in contravention of the 14th Amendment of the Constitution
21 of the United States providing that no citizen of the United States shall be deprived of his property without due process of law, and plaintiffs further aver that the various proceedings taken with reference to the levy and collection of said tax are not only in contravention of the said constitutional provisions, but that said proceedings are illegal, unauthorized and void for the further reason that said proceedings exceed even the pretended authority granted by the said void act; that by reason of the fact that all said proceedings are unjust, oppressive, illegal, unauthorized and void, these plaintiffs have refused and still refuse to pay the said Little River Drainage tax, and that in consequence of their said refusal they are about to be subjected to the wrongs and injuries above set forth, and that they will be subjected to irreparable injury, at the hands of defendants, unless defendants are by this court restrained from further performance of the acts herein complained of; that by said acts and proceedings a cloud is cast upon the title of these plaintiffs with respect to their said lands; that their lands are liable to be seized and sold, as aforesaid; that any attempt to vindicate their rights in the premises by the ordinary procedure of law would result in a multiplicity of suits, and that they are remediless in the premises.

Wherefore, plaintiffs pray that said "Act," being section 5538, Revised Statutes of Missouri for 1909, be declared unconstitutional and void; and that said Little River Drainage tax be declared illegal and void and of no force and effect; that defendant Grant be perpetually enjoined and restrained from proceeding any further with the collection of said Little River Drainage tax from these plaintiffs; that defendant Govert be perpetually enjoined and restrained from filing any further resolutions or orders of said board of supervisors relating
to the levy or assessment of such tax against said lands of
22 these plaintiffs; and that defendant Govert be perpetually enjoined and restrained from making any other or further extensions of said tax upon the tax books of Cape Girardeau county, against said lands of these plaintiffs; that defendants, John H. Himmelberger, George S. Hanford, A. J. Matthews, S. P. Reynolds, C. W. Henderson and A. L. Harty be perpetually enjoined and restrained from making any further levy or assessment of said tax against said lands of these plaintiffs, and from ordering any other or

further extensions of said tax to be made against plaintiffs' said lands by defendant Goyert on the tax books of Cape Girardeau county; and that the Little River Drainage District and all the other defendants and the successors in office of said other defendants be perpetually enjoined and restrained from proceeding under said void enactment to assess or levy or to attempt to assess or levy any such tax against any of said lands of these plaintiffs; and plaintiffs also pray for such other and further relief as to the court may seem meet and proper, and for their costs."

In due time, at the said January term of said circuit court, the defendants filed a demurrer to said petition, said demurrer being as follows:

Demurrer.

"Come now the defendants in the above entitled cause and demur to the plaintiffs' amended petition herein and for cause of said demurrer defendants say that said petition does not state facts sufficient to constitute a cause of action against either one of the several defendants herein nor against said defendants jointly."

Thereafter the parties made, signed and on January 6, 1911, it being the fifth day of said January term, filed in said cause a stipulation as follows:

Stipulation.

"It is admitted that the only question in controversy in this cause is as to the constitutionality of section 5538 of the R. S. of Mo. 1909.

23 "If the Court should find on demurrer to plaintiffs' petition that section 5538 is a valid and legal section under the constitution of Missouri and of the U. S., the demurrer should be sustained and plaintiffs' bill dismissed.

"If, on the other hand, the court shall find said section violates either the constitution of Missouri or of the United States, then said demurrer should be overruled and judgment entered accordingly. Each party reserves the right to appeal from the judgment of the said circuit court."

Thereafter, on the said fifth day of the term, this cause was duly taken up, argued and submitted to the court on the said petition, demurrer and stipulation, and the cause was by the court taken under advisement.

Thereafter, on January 23, 1911, during the seventh day of said January term, the issues so submitted were decided in favor of defendants and against plaintiffs, and the Court accordingly duly made and entered its judgment of record by which it sustained said demurrer and adjudged that plaintiffs were entitled to no relief; that they take nothing by their writ and that defendants go thereof without day and recover of plaintiffs their costs and that execution issue therefor.

Thereafter, during the said seventh day of the January, 1911, term of said court, the plaintiffs filed their motion for a new trial, and thereafter, on the same day of the same term, filed their motion in arrest of judgment, all as shown by the record entries made at the time.

Thereafter, the court, having duly considered said motion for a new trial, overruled the same on January 24, 1911, it being the eighth day of said January, 1911, term, and thereafter, during the said eighth day of the term, the court also overruled said motion in arrest of judgment, the action of the court in overruling each of said motions being shown by the record entries in each instance made at the time.

24 Thereafter, during the said eighth day of said January term, the plaintiffs deposited with the clerk of said circuit court ten dollars, as and for the docket fee required by law for the clerk of the Supreme Court of Missouri, and also filed their application and affidavit for an appeal, the affidavit being duly subscribed and sworn to by B. C. Hardesty, attorney for plaintiffs, and being as follows (caption, signature and jurat omitted):

"Now in the above entitled cause, come plaintiffs, Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden, John Job, Louis Keller, C. F. W. Daume, Alvin Feuerhahn, John Eggimann, C. G. Cox, Louisa Wessell, Herman Daume and Joseph Schaefer, and deposit with the clerk of this court the sum of Ten Dollars as and for the docket fee required by law, for the clerk of the Supreme Court of the State of Missouri, and said plaintiffs (appellants) pray for an appeal in said cause to said Supreme Court, and B. C. Hardesty, being duly sworn, upon his oath, says that he is attorney and agent for all said plaintiffs (appellants), and duly authorized to take this appeal, and that the appeal prayed for is not made for vexation or delay, but because the affiant believes that the appellants are aggrieved by the judgment and decision of the Circuit Court of Cape Girardeau County, Missouri."

Thereafter, during said eighth day of said January term, the Court having seen and heard the said affidavit, found the same to be sufficient and by order duly entered of record, granted the appeal prayed for to the Supreme Court of the State of Missouri.

Thereafter, during said eighth day of the term, the Honorable Charles B. Faris, the judge of said court who tried this cause, signed and sealed the plaintiffs' bill of exceptions herein, and on the same day of the same term, to-wit: on said eighth day of January, 1911, term of said circuit court the said bill of exceptions was filed in this cause, as shown by the record entry made at the time,

25 and the said bill of exceptions thus filed is as follows (caption ommitted):

(2) Bill of Exceptions.

"Be it Remembered, that on the trial of this cause on the sixth day of January, 1911, it being the fifth day of the January, 1911, term of said court, the following proceedings were had, to-wit:

The defendants having demurred to plaintiffs' amended petition, thereupon all the parties both plaintiff and defendant made and filed herein a stipulation as follows:

Stipulation.

"It is admitted that the only question in controversy in this cause is as to the constitutionality of section 5538 of the R. S. of Mo. 1909.

If the Court should find on demurrer to plaintiffs' petition that section 5538 is a valid and legal section under the constitution of Missouri and of the U. S., the demurrer should be sustained and plaintiffs' bill dismis-ed.

If on the other hand the court shall find said section violates either the constitution of Missouri or of the U. S., then said demurrer should be overruled and judgment entered accordingly. Each party reserves the right to appeal from the judgment of the said circuit court."

Thereupon, this cause, coming on to be heardo on said amended petition, demurrer and stipulation, was duly argued and submitted to the court, and by the court taken under advisement until the 23rd day of January, 1911, on which last named date, it being the 7th day of the January, 1911, term of said court, the court sustained said demurrer and found for the defendants and against the plaintiffs and made and entered its judgment of record, for the defendants and against the plaintiffs, all as shown by the record entry made at the time.

26 Thereupon, the plaintiffs during the same day of the same term last mentioned filed their motion for a new trial as follows:

Motion for New Trial.

"Now, on the 23rd day of January, 1911, come plaintiffs Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden, John Job, Louis Keller, C. F. W. Daume, Alvin Feuerhahn, John Eggimann, C. G. Cox, Louisa Wessell, Herman Daume and Joseph Schaeffer and move the court to set aside its finding, decision and judgment this day rendered in this cause, and to grant plaintiffs a new trial herein for the reason that in deciding the issues herein made up by the amended petition, demurrer and stipulation herein, the court erred in finding for the defendants and against the plaintiffs and also erred in the following respects, to-wit:

In ruling, decreeing and adjudging that Section No. 5538 of the Revised Statutes of Missouri for 1909 is, under the constitution of the State of Missouri, a valid and constitutional law and not in conflict with, or any contravention of any provision of the constitution of said State, and in particular not in conflict with any of the following Sections of said Missouri constitution, to-wit: Sections 3, 4, 11 and 12 of Article 10, and Sections 21 and 30 of Article 2.

Second, in ruling, decreeing and adjudging that said Section No. 5538 is, under the constitution of the United States, a valid and constitutional law and not in conflict with any provisions of the United States Constitution, and in particular not in conflict with or in contravention of the Fourteenth Amendment to the Constitution of the United States."

Thereafer, during the same day and the same term last mentioned, the plaintiffs filed their motion in arrest of judgment, as follows:

27 Motion in Arrest of Judgment.

"On this 23rd day of January, 1911, come plaintiffs Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden, John Job, Louis Keller, C. F. W. Daume, Alvin Feuerhahn, John Eggimann, C. G. Cox, Louisa Wessell, Herman Daume and Joseph Schaefer, and move the court to arrest the judgment this day rendered in said cause, and as reasons for this motion state:

First, that upon the record said judgment is erroneous.

Second, that the amended petition states facts sufficient to constitute a cause of action and that on the issues made up by said petition, and the demurrer and the stipulation, the court erred in ruling, decreeing and adjudging that said judgment should be for the defendants and against the plaintiffs, and that plaintiffs had no legal right to the relief sought, or to any relief.

Third, that that part of the record proper consisting of the petition, the demurrer and the stipulation herein, shows on its face that the judgment herein ought to have been for the plaintiffs, and that this court should have granted plaintiffs the relief prayed for in said petition.

Fourth, that the entire record proper shows on its face that the court has ruled, decreed and adjudged the following points, to-wit: that Section No. 5538 of the Revised Statutes of Missouri for 1909, is valid and constitutional and not in conflict with any provision of the constitution of Missouri, and in particular not in conflict with Sections 3, 4, 11 and 12 of Article 10, and Section- 21 and 30 of Article 2, of said Missouri Constitution; that the entire record proper also shows on its face that this court has ruled, adjudged and decreed these points, to-wit: that said Section No. 5538 is not in conflict with any provision of the Constitution of the United States, and in particular not in conflict with the Fourteenth Amendment to the Constitution of the United States, and that in respect to each
28 and all of said points thus appearing upon the face of the record proper, said judgment is erroneous, and should be arrested by the court.

Fifth, that the entire record proper on its face shows the judgment and decree to be erroneous, and for the wrong parties and in contravention of the constitutional rights of plaintiffs under both the Constitution of Missouri and the Constitution of the United States.

Wherefore, plaintiffs again move that said judgment be arrested and for naught held and that in lieu thereof another judgment and decree be entered, granting these plaintiffs the relief prayed for by them."

Thereupon, the court duly considered said motion for a new trial and the argument of plaintiffs' counsel in support thereof, and the argument of defendants' counsel in opposition thereto, and after such due consideration, on January 24th, 1911, it being the 8th day of said January term, the court overruled said motion for a new trial, as shown by the record entry made at the time.

To the action of the court in overruling said motion for a new trial, plaintiffs duly objected, and immediately after the overruling

of said motion for a new trial, plaintiffs then and there also objected and excepted to such action of the court, and then and there duly saved all such objections and exceptions.

Thereupon, the court duly considered said motion in arrest of judgment, together with the argument of plaintiffs' counsel in support thereof, and the argument of defendants' counsel in opposition thereto, and after such due consideration, during the same day and the same term last mentioned, the court overruled said motion in arrest of judgment, as shown by the record entry made at the time.

To the action of the court in overruling said motion in arrest of judgment, plaintiffs duly objected, and immediately after
29 the overruling of said motion in arrest, plaintiffs then and there also objected and excepted to such action of the court, and then and there duly saved all such objections and exceptions.

And that the above matters and things, rulings and exceptions may be made a part of the record herein, plaintiffs tender this their bill of exceptions, and pray that the same may be signed and sealed as such, which is accordingly done on this 24th day of January, 1911, and during the said eighth day of said January, 1911, term.

(Signed) C. B. FARIS,
Judge of the Circuit Court of Cape Girardeau County, Missouri."

Said bill of exceptions was duly filed in time, being filed on the same day and during the same term in which the motions for new trial and in arrest of judgment were overruled and the appeal granted, it being the eighth day of said January, 1911, term of said circuit court, all as shown by the record entries heretofore set out in the abstract of the record proper.

Thereafter, on February 28th, 1911, the plaintiffs duly filed in the office of the Clerk of this court a certified copy of the judgment and order granting the appeal, and the case is now pending in this Court on the record as hereinbefore set out.

Respectfully submitted,

GIBONEY HOUCK, AND
DAVIS & HARDESTY,
Attorneys for Appellants (Plaintiffs).

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On the back of the above is marked "Filed September 11th, 1911, J. D. Allen, Clerk."

31 In the Supreme Court of Missouri, Division No. 1, October Term, 1911.

And thereafter, to-wit, on October 11th, 1911, same being the second day of the regular October 1911 Term, the following further proceedings were had in said cause:

16546.

"Louis Houck et al., App.,
vs.
Little River Drain. Dist. et al., Resp.

Come now the said parties, by attorney, and after arguments herein, submit this cause to the Court."

And thereafter, to-wit on *the* November 30th, 1912, same being the fifty-third day of the regular October 1912 Term, the following further proceedings were had in said cause:

16546.

"Louis Houck, and Mary H. G. Houck, his wife, John Job, Louis Keller, C. F. W. Daume, Joseph Schafer, Alvin Feuerhahn, John Eggiman, Chas. J. Juden, C. G. Cox, Louisa Wessell, and Herman Daume, Plaintiffs-Appellants,
vs.
Little River Drainage District, John H. Himmelberger, and Geo. S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, Members of said Board; Fred Goyert, and Clarence Grant, Respectively Clerk of the County Court and Collector of the Revenue of Cape Girardeau County, Missouri, Defendants-Respondents.

Appeal from Circuit Court of Cape Girardeau County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cape Girardeau County rendered, be in all things affirmed
32 and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have execution therefor. (Opinion filed.")

Which said opinion is in words and figures as follows, to-wit:

33 In the Supreme Court of Missouri, First Division, October Term, 1912.

No. 16546.

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Appeal from Cape Girardeau County Circuit Court.

This is a suit by the owners of lands in the defendant drainage district, which was incorporated by the judgment of the Butler county circuit court, November 30, 1907, under the provisions of article 3, chapter 122 of the Revised Statutes of Missouri 1899, as amended by the act of April 8, 1905. The object of the suit is to enjoin the collection of a tax of twenty-five cents per acre upon the lands of plaintiffs, in common with other lands of the district, levied under the provisions of the act of June 1, 1909 which is now section 5538 of the Revised Statutes of 1909. The defendants demurred to the petition, and the issue of law so raised was tried upon the following stipulation:

"It is admitted that the only question in controversy in this cause is as to the constitutionality of section 5538 of the R. S. of Mo. 1909.

"If the court should find on demurrer to plaintiffs' petition that section 5538 is a valid and legal section under the constitution of Missouri and of the U. S., the demurrer should be sustained and plaintiffs' bill dismissed.

"If on the other hand the court shall find said section
34 violates either the constitution of Missouri or of the U. S., then said demurrer should be overruled and judgment entered accordingly. Each party reserves the right to appeal from the judgment of the said circuit court."

The demurrer was sustained and final judgment for defendants entered, from which this appeal is taken.

It was contended in the trial court that the section referred to (5538 R. S. 1909) is in contravention of sections three, four, eleven and twelve of article ten, and sections four, fifteen, twenty-one and thirty, of article two, of the constitution of Missouri, and of section one of the Fourteenth Amendment to the constitution of the United States. If this position is well taken on any of these grounds the judgment of the trial court should be reversed; otherwise it must be affirmed.

I. That the state by its legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed lands by ditches and drains and levees, in districts prescribed by it, or to be ascertained and fixed by such appropriate instrumentalities as it may provide, is no longer a question in his state. Nor is it an open question that the instrumentality so created may be invested with all the necessary power and authority to con-

struct and maintain whatever works may be necessary to accomplish such object, and to raise the funds to pay for the same by assessment on the lands to be benefited thereby. Egyptian Levee Co. vs. Hardin, 27 Mo., 495; Columbia Bottom Levee Company vs. Meier, 39 Mo., 53; Mound City Land and Stock Company vs. Miller, 170 Mo., 240; Squaw Creek Drainage District vs. Turney, 235 Mo., 80; Morrison vs. Morey, 146 Mo., 543; State vs. Chariton Drainage District, 192 Mo., 517; State vs. Taylor, 224, 393; Little River Drainage District vs. Railroad, 236 Mo., 94. These corporations, as is said in the most of the cases cited are, when formed, public sub-
35 divisions of the state, exercising the powers granted them for the purposes of their creation, within their territorial jurisdiction, as fully, and by the same authority, as the municipal corporations of the state exercise the powers vested by their charters. That the special taxes they are authorized to levy and collect upon and for the benefit of the lands included in their districts do not come within the provisions of Article ten of the state constitution invoked by the appellants, has long been settled, and has passed from the realm of legitimate discussion. Appellant contends, however, that the flat tax of twenty-five cents per acre has no relation whatever to benefits to the lands so taxed. In other words, it must either be an assessment for benefits to the lands to which it is applied, or such a general tax for governmental purposes as is required by the constitution to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and with respect to which all property subject to taxation must be taxed in proportion to its value. No kind of governmental exaction imposed upon property under color of the taxing power, and lying between or outside these two classes, it is contended, constitutes due process of law, and every such exaction is a taking of private property for private use, or for public use without just compensation.

The taxing power is an incident to every function of the state, but under our system of government, it cannot stand alone. Every tax must rest on a public purpose to which its proceeds must be devoted. The police powers on the other hand, as was said by Chief Justice Waite in Munn vs. Illinois, 94 U. S. 113, 125, quoting from Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." It calls to its aid the subordinate powers—
36 the taxing power, and the power of eminent domain—and their extent is then measured by its purposes. These subordinate powers, each in its sphere, have for their purpose the absolute taking of private property for public use. General taxation compensates the taxpayer for this taking with all those advantages which result to him from the maintenance of the government; such as the protection of person and property, the making and execution of laws for the promotion of the general welfare of the people with respect to both person and property, and the general readiness of such an organization to meet all contingencies involving their interests. In selecting the subjects of this class of taxation, and in the

assessment and levy of the taxes, it is not expected that even proximate perfection will be attained. The discretion of the legislature, subject only to well defined constitutional restrictions, must be full and untrammelled; otherwise revenue laws would never pass the region of judicial debate into the region of execution. They would be relegated to that field of discussion now occupied by theories being tried out in the forum of the people, to be adopted or rejected as the public judgment shall determine. In these respects the legislature is within its discretion where it has kept in view those fundamental principles prescribed by the constitution, and exercised the legislative judgment in the methods adopted for carrying them out. This legislative discretion, applies equally to the field of special taxation which lies between the imposition of taxes for general governmental purposes and the exercise of the right of eminent domain, and sometimes so close to either that they seem to overlap and mingle.

The right to tax through governmental agencies in cases like this depends upon the truth that the development of the lands of the state in productiveness and value, as well as the promotion of the health and comfort of the people, is a matter of governmental concern; and where such improvements are made necessary by
37 local conditions which greatly impair the value of the lands of an entire district, and the primary result of their accomplishment will be a corresponding benefit to all, experience has shown that the state is the only power that can so combine the elements involved that each may bear a fair and just proportion of the cost. That this proportion should bear some relation, in theory at least, to the benefits accruing to the property, seems fair and just, and is the general result toward which the efforts of different legislatures, including our own, are directed. Referring to the legislative discretion in this respect, Judge Napton, in Egyptian Levee Company vs. Harden, 27 Mo., 495, 498, said:

"In every form of taxation, whether general or local, it is certainly desirable and proper that the burden should be distributed as near as may be in proportion to the benefit derived; and constitutional injunctions and restrictions, where they have been attempted on this subject et all, are designed to promote this end. But where there is an absence of constitutional provisions, it is not in the power of the courts to enforce any fancied scheme of equality seeming to them more just than the one adopted by the legislature. The latter department of government is wisely entrusted with the entire control of this subject, and if practical injustice is done, the remedy is in the hands of the people. Equality of taxation may, however, be regarded as one of these Utopian visions, which neither philosopher nor legislator has ever yet realized."

That is probably the pioneer case in this court involving the subject of land reclamation in this connection, and but few cases have had the fortune to have been approved by this court as *p*requently and unreservedly, or cited with more favor in other jurisdictions. The levee district had been chartered and organized under an act of the General Assembly approved March 2, 1855 (Laws 1855, p. 73) authorizing the assessment and collection of a flat tax of fifty

cents per acre for the prosecution of the work contemplated.
38 This amount was, by a subsequent act, raised to one dollar per acre and was, under the original act, to be levied by the directors of the corporation. As indicated by the extract quoted the act was sustained by this court. It is safe to say that the doctrine is firmly established in this state that the legislature, acting within its constitutional powers, may fix the territorial limits of special taxing districts, and may also fix the actual or maximum amount of special assessments, which they may place at a level rate, founded upon a unit of area or frontage, or at a rate founded upon a proceeding to ascertain the actual benefit accruing to each particular tract; or it may delegate any or all these powers to an appropriate agency to be chosen or created by it. Little River Drainage District vs. Railroad, supra; Columbia Bottom Levee Company vs. Meier, supra; Meier vs. St. Louis, 180 Mo., 391, 408 and cases cited; Mound City Land and Stock Company vs. Miller, supra; St. Joseph vs. Farrell, 106 Mo., 437; Prior vs. Construction Co., 170 Mo., 439, 448 and cases cited. When all this has been done by valid legislation, founded upon those principles of public expediency to which we have referred, "the owner of the property in the district cannot be heard to contend in the court that his property was not in fact benefited, or to the amount assessed in accordance with such apportionment." Meier vs. St. Louis, supra; Prior vs. Construction Co., supra.

II. The section against the constitutionality of which, as a whole, this attack is made is as follows:

"As soon as any drainage district shall have been organized under order of the Circuit Court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power and authority to levy upon each acre of land in the district, not to exceed twenty-five cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits
39 and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the opinion of its board of supervisors it be desirable to do so, make such level assessment for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work purposed may have failed or have been found impractical."

Up to the time of the passage of this provision in 1909, the legislature, in dealing with this subject, acted upon the theory that a greater measure of justice would result from an intelligent attempt to ascertain the actual and comparative benefit that would result to each tract, than from any arbitrary method of assessment, and the original act was drawn on this plan. It was soon developed that in order to approximate the desired result, it was necessary that expensive preliminary work be done to develop the contour of the different tracts of land involved in the scheme with reference to the

positions and levels available for the contemplated drainage. It was also thought that the feasibility of the entire enterprise might in some instances depend upon this information. In such cases it is evidently to the interest of all concerned that the facts should be ascertained at the earliest moment and with the least possible expenditure. In these respects the preliminary work was for the purpose of relieving those who should be found to receive the least benefit from the execution of the contemplated plan from an unjust burden, as well as to obtain such data, that the cost might be imposed upon those who ought in equity to bear it. Those relieved would in this way become, to that extent, the real beneficiaries. It is not within our province to find fault with the legislative reasoning, and if it were, we doubt whether we could substitute a better
40 or more equitable plan. The appellant attacks it because (1) no judicial finding of "benefits" is required by the law as a foundation for levying this assessment, and (2) that it might be developed by the work, and we must therefore assume it to be contemplated by the law; that there will be no resulting increment that, under the name of "benefits," constitutes the only constitutional support for this class of taxation. As to the first of these points, we have already seen that the question of benefits is primarily a legislative one. In this case, however, the legislature has seen fit to entrust to the judicial department the establishment and territorial limitation of the benefit district in a proceeding in which the question whether or not each tract included will be benefited is directly involved. Having expressed its will as to the principles which should govern the distribution of these taxes upon the land so found to be benefited the legislature has left the necessary amount of the assessments to be ascertained by the authorities of the district, as it leaves like questions of municipal taxation to its municipal agencies.

III. The second point stated is predicated upon, or, at least, strongly illustrated by that clause of the section which provides that "such levy may be made although the work proposed may have failed, or have been found impractical." Of this provision the appellant argues: "If those land owners to whom the drainage proceedings are in invitum can be compelled to pay this preliminary tax for drainage which, prior to the levy of the tax, had failed and been abandoned as impracticable, then they are made to pay, not on the principle of benefits, but simply to defray the expenses of a fruitless undertaking on the part of the state, and an undertaking in invitum as to them." This, it is claimed, would violate the several provisions of the state and national constitutions designed for the protection of private property against the public. The case is not, however, so presented in the record. At the time of the filing of the petition the surveys had been made by the board of
41 engineers constituted as provided by the statute, a plan of drainage reported to and adopted by the board of supervisors, the commission for viewing the lands and assessing benefits and damages had been appointed and was then engaged in that work, and the tax had been levied and extended on the tax books in the hands of the collector of the revenue for the county in which the

lands are situated. It was stipulated by the parties that the constitutionality of the section we have quoted is the only question in controversy; that if it is a valid and legal section under the state and federal constitutions the bill is to be dismissed; if not judgment shall be entered accordingly. If the section is valid according to its terms its application to the facts of this case is not questioned.

We have already shown that the legislature had the power to fix the boundaries of the district to be benefited by the work by referring the same to judicial ascertainment, and that, having done this its power extended to the levy of a tax by special assessment upon the entire property of the district so ascertained to be benefitted, to be distributed in such manner as, in the legislative judgment, would secure equality. It no longer lay in the mouth of the owner of the included property to deny that he was benefited to the extent of the burden so imposed, whether by a uniform assessment founded upon the unit of area, or by attempting to differentiate the peculiar conditions pertaining to each tract. In this case the legislature combined the two, and in so doing was equally within its powers. The last clause of the section in dispute gives no warrant for the discontinuance of the work. It simply recognizes, as the court would recognize had it not been written, that after expensive preliminary work such enterprises may possibly be found unfeasible, and that unfor-seen accidents or conditions either physical or financial frustrate the wisest plans.

Our sediment carrying rivers may change their courses
42 through their alluvial plains so that a scheme founded upon conditions of this year may be entirely unsuitable, as respects both cost and working details, to the conditions of next year; or financial disaster may sweep money from its ordinary channels so that the excavation that was made yesterday may lie incomplete until obliterated by the floods of tomorrow. All these things are in human contemplation and even Justice is not so blind that she will not take notice of them.

It is not to be contemplated that in such cases the loss should be made to fall upon the individual whose hands and head with infinite labor has accomplished the details of plan and execution up to that point. These things must be paid, and this case resolves itself into a question of raising money for such purpose which may be concretely stated as follows. Is it within the statutory powers of the legislature in providing for a work of this character, to assess its cost against the property to be benefited by its completion, so that payment shall be exacted from time to time as it shall become necessary to expend the money for its execution? It is plain that in answering this question there can be no difference in principle resulting from the character of the work, if any, already completed when the collection is sought to be made; for all work, whether purely preliminary or purely constructive, is alike a necessary part of the whole.

Whether we consider the public interest in these enterprises from the standpoint of public health or material prosperity, they are alike local in their character in all those senses in which the sanitation and traffic conveniences of the city are local to the municipality. The growth and prosperity of the city resulting from these things,

are matters of great public concern affecting the state at large. So the prosperity and growth of the productive communities represented by its farms are equally matters of general public concern. That concern is represented by the difference between a state composed of bogs and marshes not only unproductive but un-
43 healthy, and a state in which the lands yield bountifully to the call of the husbandman, and breathe health instead of miasma. In a material sense improvements which produce those desirable changes find their first and most direct effect in the values of land. In the city, farms become lots, and their value is frequently multiplied by thousands; while in the reclamation districts we find localities where large bodies of land not worth the taxes, have, by reclamation, become very valuable. All these direct benefits may be foreseen and to some extent estimated in figures, and it is just that each community affected by them should take care of the local improvements that produce them, along the same lines that other municipal subdivisions of the state government take care of similar interests. These public enterprises differ from individual enterprises of the same character only in the element that the conditions in which they exist are such that the property of one can only be improved by expenditure that is of like advantage to many, but the political community having been substituted for the individual it is confronted with conditions requiring the same treatment, and its powers are sufficient to the task. The man who contemplates such an improvement, starting only with what an unaided eye tells him of the situation, determines that it will pay him to attempt to apply the remedy. He makes accurate surveys with plans and estimates, and finds it feasible and does the work and every class of expense in carrying out the experiment from the time it existed in his mind alone, is a part of the cost of the completed enterprise. If at any time before the completion his work proves the enterprise to be impracticable, he has still accomplished in behalf of his land one of the things which he set out to do. He has demonstrated once for all either that the work is impracticable, or that the conditions are not yet ripe for its accomplishment. If this result cannot be said to be a benefit, then every man who
44 expends time or money in tentative experiment upon his land is justified only if he succeeds and has done nothing useful if he has failed.

Applying these principles to this case we find that the legislature has designed an important public work and has found that its accomplishment will result in such benefit to the lands included in its scope as to justify the assessment of the entire cost as a special tax against them. That it has the power to do this is, as we have seen, no longer open to question. To accomplish the purpose it is necessary to pay for the property used and labor employed in the work and this can only be done by the proceeds of public taxation, and taxes, as we have already said, can only be levied for the accomplishment of a public purpose. The power to tax necessarily includes the power to raise the money in such time and manner as is necessary to accomplish the purpose for which the tax is levied. Were

this not true the power would be an empty one existing only in impracticable theory and not in fact. These principles necessarily apply to every class of taxation, general and special. This whole question was necessarily before the court and decided in Corrigan vs. Kansas City, 211 Mo., 608, in which a special tax was levied and sustained "for the purpose of maintaining, adorning, constructing, repairing and otherwise improving the parks, parkways, roads, boulevards or avenues" located in West Park District. This tax was an annual one designed to provide for future work and was held to be collectable.

It will hardly be disputed that the state might, out of its general revenues resulting from taxation, pay for the very preliminary work provided for in the section we are considering, or it might authorize the same to be paid out of the contingent fund of the county as was done in State vs. Taylor, 224 Mo., 393. This can only be done because the purpose is a public one to which the proceeds of taxation may be lawfully applied. The public purpose which justi-
45 fies this application can only be the promotion of the health and general welfare of the community by the betterment of the condition of its lands, and is of itself the same purpose upon which the power to impose the special assessment rests. It follows that in this respect it is a valid assessment.

IV. It is contended that the section in question is void because it creates a rule of taxation not in existence at the time the defendant drainage district was organized and the plaintiffs became members of it, and it is therefore retrospective as to them and impairs the obligation of a contract constituted by its charter. This question does not come within the terms of the stipulation under which the sole issue was tried upon the petition and demurrer. Instead of questioning the constitutionality of the law, it simply goes to its application to the facts of this case. We do not hesitate, however, to say that the charter of a public corporation does not constitute a contract with its members that the laws it was created to administer will not be changed; and the state is still at liberty, as to them and the corporation, to continue its efforts to improve its methods of taxation with respect to these subjects.

The judgment of the circuit court for Cape Girardeau County is affirmed.

STEPHEN S. BROWN,
Commissioner.

Per Curiam:

The foregoing opinion of Brown, C., is adopted as the opinion of the Court. All concur.

46 And thereafter, to-wit, on December 7th, 1912, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri.

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAIN. DIST. et al., Respondents.

Come now the Appellants herein, by attorney, and file their motion to transfer this cause to Court in Banc."

Which said motion to transfer to Court in Banc is in words and figures as follows, to-wit:

47 In the Supreme Court of Missouri, First Division, October Term, 1912.

No. 16546.

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Appeal from Cape Girardeau County Circuit Court.

Motion to Transfer from said First Division to Court en Banc.

Now come appellants within ten (10) days after the rendition of the final judgment herein by the said first division of this court on the 30 day of November, 1912, and respectfully represent to the court that the face of the nisi prius record, and also of the judgment and opinion of this court, herein, affirmatively show the following, towit: that a Federal question is involved in this cause; that this is a suit in equity to enjoin the collection of the tax of 25¢ per acre purported to be authorized by Section 5538 R. S. of Mo. 1909; that one of the grounds of the petition for the injunction is that said Section 5538 is void, and in contravention of the constitution of the United States, and in particular in contravention of Section 1 of the Fourteenth Amendment of the United States Constitution; that this case was submitted to the trial court on a stipulation providing that if said Section 5538 should be in contravention of said Constitution of the United States, the judgment should be for plaintiffs, (appellants); that within four days after judgment against them on said stipulation, appellants duly filed motions for new trial and in arrest, both founded on reasons, among others, that the judgment of the trial court was in contravention of plaintiffs' rights under the Federal Constitution, and in particular under Section 1 of Amendment 14 thereof; that by said judgment and opinion of this court, it has been adjudged that said Section 5538 is valid under the constitution of the United States and contravenes no rights of appellants thereunder; that the judgment of the trial court and the

judgment and opinion of this court affirming the judgment
48 of the trial court, have necessarily involved an adjudication that Section 5538 R. S. of Mo. 1909, is valid under the Constitution of the United States and not in contravention with any portion thereof, and in particular not in contravention with these portions thereof, towit: Section 10 of Article 1 prohibiting any state from passing a law impairing the obligation of a contract, Section 1 of Amendment 14 prohibiting any state from depriving any person of property without due process of law or denying any person within its jurisdiction the equal protection of the laws, and Article 5 of the Amendment providing that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without compensation.

Wherefore appellants respectfully move that this cause be transferred to the court en banc, as provided by Section 4 of the Amendment of 1890 to Article VI of the Constitution of Missouri.

DAVIS & HARDESTY,
Attorneys for Appellants.

49 In the Supreme Court of Missouri, First Division, October Term, 1912.

No. 16546.

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Appeal from Cape Girardeau County Circuit Court.

Notice of Motion to Transfer to Court en Banc.

To the Above Named Respondents or Oliver & Oliver, Their Attorneys of Record:

You are hereby notified that the appellants in the above entitled cause will on Monday, December 9th, 1912, at the hour of meeting of said court on said day, or as soon thereafter as leave can be obtained, file a motion to transfer the said cause to the Court En Banc on the ground that a Federal question is involved, as provided by Section 4 of Amendment of 1890 to Article VI of the Constitution of Missouri.

A true copy of said motion is hereto attached.

DAVIS & HARDESTY,
Attorneys for Appellants.

Service of a true copy of the above notice, with copy of said motion thereto attached is hereby acknowledged this December 6, 1912, 2:30 P. M.

OLIVER & OLIVER,
Attorneys for Respondents.

(On the back of the above is marked "Filed Dec. 7, 1912, J. D. Allen, Clerk."

50 And thereafter, to-wit on December 24th, 1912, the following further proceedings were had and entered of record in said cause:

16546.

"LOUIS HOUCK et al., App.,
vs.
LITTLE RIVER DRAIN. DIST. et al., Resp.

Now at this day the Court having seen and fully understood the appellant's motion to transfer this cause to Court in Banc, doth order that said motion be sustained and said cause transferred to Court in Banc."

And afterwards, to-wit, on February 1st, 1913, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri, October Term, 1912, January Call, 1913. In Banc.

16546.

"LOUIS HOUCK et al., App.,
vs.
LITTLE RIVER DRAIN. DIST. et al., Resp.

Come now the parties aforesaid, by attorneys, and after argument herein, submit this cause to the Court."

51 And afterwards, to-wit, on February 12th, 1913, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri. In Banc.

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAIN. DIST. et al., Respondents.

Appeal from the Circuit Court of Cape Girardeau County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cape Girardeau County rendered, be in all things affirmed and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have execution therefor. (Opinion filed.)"

"*Per Curiam*, in Banc: The foregoing cause coming into Banc from Division One and being reheard there, the opinion of Commissioner Brown is adopted as the opinion of the Court. Brown, J., concurring in the result, Bond, J., dissenting, and Faris, J., not sitting."

(Opinion delivered by Brown, C., in Division No. 1, adopted, and to avoid copying this opinion twice in this record, reference is hereby made to the copy of said opinion above set forth.)

52 And afterwards, to-wit, on February 22nd, 1913, the following further proceedings were had and entered of record in said cause:

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAIN. DIST. et al., Respondents.

Come now the said Appellants by attorney, and file their motion for a rehearing herein."

And thereafter, to-wit, on March 1st, 1913, the following further proceedings were had and entered of record in said cause:

16546.

"LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAIN. DIST. et al., Respondents.

Now at this day the Court having considered and fully understood the motion heretofore filed by the appellants for a rehearing herein, doth order that said motion be, and the same is hereby overruled. (Bond, J., dissents. Faris, J., not sitting.)"

Which said motion for rehearing is in words and figures as follows, to-wit:

53 In the Supreme Court of the State of Missouri, en Banc, October Term, 1912.

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER RRIANAGE DISTRICT et al., Respondents.

Appeal from the Circuit Court of Cape Girardeau County, Missouri.

Appellants' Motion for Rehearing and Reasons in Support of the Same.

Now come appellants and respectfully move this court for a rehearing of this cause, because this court in adopting the opinion of

Division No. One as the opinion of the Court en banc, has overlooked the following decisive questions of the case, duly submitted by appellants' counsel, towit:

I.

That the constitutionality of a law is to be tested not by what has been done, but by what may, under its authority, be done, as held in Stewart vs. Palmer 74 N. Y. 183; Norwood vs. Baker 172 U. S. 269.

II.

That section 5538 R. S. of Mo. 1909, violates Sections 21 and 30 of Art. 2 of the Missouri Constitution and Amendment 5 and Section 1 of the 14th Amendment of the U. S. Constitution by depriving appellants of property for public use without compensation and without due process of law; and that due process of law includes the idea of compensation for property taken for public use, as shown by Chicago B. & Q. R. Co. vs. Chicago, 17 U. S. Sup. Ct. Rep. 581, l. c. 584, 166 U. S. 226 l. c. 241; Long Island Water Supply Co. v. Brooklyn, 17 U. S. Sup. Ct. Rep. l. c. 722, 166 U. S. l. c. 695; Norwood v. Baker 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269, and Kansas City vs. St. Louis & San Francisco R. Co. 230 Mo. 369, 28 L. R. A. (N. S.) 669.

III.

That Section 5538 R. S. of Mo. 1909 shows on its face that it disregards the principle of benefits and seeks to levy a tax to
54 pay the cost of not an improvement, but of an abandoned and abortive drainage scheme.

IV.

That the only "benefits" which can furnish a basis for the levy of a special assessment to pay for a public improvement, are benefits that constitute a "betterment" to the land, as shown by Kansas City vs. St. Louis & San Francisco R. Co. 230 Mo. 369, 28 L. R. A. (N. S.) 669, Kansas City vs. O'Connor 82 M. A. 660.

V.

That the point presented in this case is quite different from that presented in Egyptian Levee Co. vs. Hardin, 27 Mo., 495, in that the assessment there upheld was an assessment for public improvements which were guaranteed to be procured for the landowner, and therefore the benefit or betterment, guaranteed and secured to the landowner, before the special assessment was levied, while in the instant case, the Act contemplates a special assessment regardless of whether the betterment is guaranteed to the landowner or not. This is a departure from the established rule of decision on this point. Kansas City vs. St. Louis & San Francisco R. Co. 230 Mo. 369, 28 L. R. A. (N. S.) 669, Kansas City vs. O'Connor, 82 M. A. 660.

VI.

That the court has also overlooked this decisive question, to wit: that the principles governing this case, were not necessarily involved in Corrigan vs. Kansas City, 211 Mo. 608, as that case upheld a special tax for future work on a legislative finding of benefits, while the decision in the instant case seeks to uphold a special tax for both past and future work, and regardless of the principle of benefits.

VII.

The court has also overlooked this decisive question of the case, namely that by its terms said section 5538 is retrospective and impairs the obligations of contracts in violation of section 15 Article 2 of the state and Section 10 of Article 1 of the United
55 States Constitution, and comes within the direct prohibition of section 15 Article 2 of the Missouri Constitution forbidding retrospective legislation (as shown by Lette vs. State Bank of St. Louis, 115 Mo. l. c. 200-201 and St. Louis to Use vs. Clemens 52 Mo. l. c. 144), and that the judgment and decision of the lower court necessarily involved an adjudication that none of the above constitutional provisions were *in*violated, State ex rel. Mulholland vs. Smith, 141 Mo. 1; Kaukauna Co. vs. Green Bay Co. 142 U. S. 254.

VIII.

The judgment and decision of this court en banc is in conflict with the following controlling decisions, to wit: Kansas City vs. Railroad 230 Mo. 369, 28 L. R. A. (N. S.) 669; Chicago, etc., R. Co. vs. Chicago 17 U. S. Sup. Ct. Rep. 583; Norwood vs. Baker 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269; Egyptian Levee Co. vs. Hardin 27 Mo. l. c. 496; McCormack vs. Patchin 53 Mo. 36; City of St. Louis to Use vs. Clemens 52 Mo. 133; State ex rel. Mulholland vs. Smith 141 Mo. 1; Kaukauna Co. vs. Green Bay Co. 142 U. S. 254.

Respectfully submitted,

GIBONEY HOUCK AND
DAVIS & HARDESTY,
Attorneys for Appellants.

Reasons in Support of Motion.

I.

In the first paragraph of subdivision III of the opinion adopted by this court, it is said that the record does not present a case where the drainage scheme has failed. We submit that the entire subdivision III shows the court has overlooked the decisive question that it is not what has been done, but what may be done under authority of this section 5538 R. S. of Mo. 1909 that determines its constitutionality. See Point I of the original Brief; also Cooley's

Const. Lim. (7th Ed.) p. 232. Stuart vs. Palmer, 74 N. Y.
56 183; Chicago, etc., R. Co. vs. Chicago 17 U. S. Sup. Court
Rep. 583; Norwood vs. Baker, 19 U. S. Sup. Court Rep.
187—same case 172 U. S. 269.

II & III.

The court has also overlooked the decisive questions indicated in sub-divisions II and III of the foregoing motion, for in the latter part of sub-division III of the opinion the court seems to authorize the levying of a special assessment for a public work regardless of the idea of benefits. These questions were duly submitted to the court. The particular controlling decisions with which this portion of the opinion is in conflict are Chicago B. & Q. R. Co. vs. Chicago, 17 U. S. Sup. Ct. Rep. 581, l. c. 584, 166 U. S. 226 l. c. 241; Long Island Water Supply Co. vs. Brooklyn, 17 U. S. Sup. Ct. Rep., l. c. 722 166 U. S. l. c. 695; Norwood vs. Baker 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269, and Kansas City vs. St. Louis & San Francisco R. Co. 230 Mo. 369, 28 L. R. A. (N. S.) 669.

IV & V.

That portion of sub-division III of the opinion found on page 11 thereof, shows that this court has not overlooked the point that the "benefits" chargeable under special assessments must be "betterments"; but does show that the court has ruled against appellants on that point, and thereby rendered a decision in conflict with the following controlling decisions, to wit: Kansas City vs. Railroad 230 Mo. 369, 28 L. R. A. (N. S.) 669; Chicago, etc., R. Co. vs. Chicago 17 U. S. Sup. Ct. Rep. 583; Norwood vs. Baker 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269; Egyption Levee Co. vs. Hardin 27 Mo. l. c. 496; McCormack vs. Patchin 53 Mo. 36.

VI & VII.

How can it be held, as the opinion seems to hold, that Corrigan vs. Gage 211 Mo. 608 is any authority for the decision herein, when in that case, the court expressly recognized the principle of question
of "benefits" as a "betterment" to the land and said that the
57 assessment would be upheld on that ground, to wit: the
ground that the assessment was to pay for a public park which would benefit the land adjacent thereto. In the instant case the legislature has attempted to levy the tax whether the ditches are dug or not. Furthermore, it attaches the assessment to past as well as to future transactions. This is in violation of the following controlling decisions and constitutional provisions: Section 15 Article 2 of the Missouri Constitution and Section 10 of Article 1 of the United States Constitution: Leete vs. State Bank of St. Louis 115 Mo. l. c. 200-201; St. Louis to Use vs. Clemens 52 Mo. l. c. 144; State ex rel. Mulholland vs. Smith 141 Mo. 1; Kaukauna Co. vs. Green Bay Co. 142 U. S. 254.

Respectfully submitted,

GIBONEY HOUCK AND
DAVIS & HARDESTY,
Attorneys for Appellants.

To Messrs. Oliver & Oliver, Attorneys of record for said Respondents:

You are hereby notified that said appellants intend to file the foregoing motion on or before February 22nd, 1913.

GIBONEY HOUCK AND
DAVIS & HARDESTY,
Attorneys for Appellants.

Service of a true copy of the foregoing motion and notice is hereby acknowledged this February 21st, 1913.

OLIVER & OLIVER,
Attorneys for Respondents.

On the back of the above is marked: "Filed September 22nd, 1913. J. D. Allen, clerk."

58 And thereafter to-wit; on November 10th, 1913, the following further proceedings were had and entered of record in said cause.

16546.

LOUIS HOUCK et al., Appellants,
vs.
LITTLE RIVER DRAINAGE DISTRICT et al., Respondents.

Now on this 10th day of November, A. D. 1913, come said appellants, and present to the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in chambers, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors attached to said petition; also a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri; also a citation directed to said respondents, citing and admonishing them to appear at the Supreme Court of the United States not exceeding thirty days from and after the date of this citation; also a bond in the sum of one thousand dollars; which said petition, together with the assignment of errors attached thereto, is filed, said writ of error allowed, said citation signed, and said bond approved and ordered filed.

59 In the Supreme Court of the State of Missouri.

In Equity. # 16546.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; CHARLES J. Juden and C. G. Cox, John Job, Louis Keller, C. F. W. Daniel, Joseph Schaeffer, Alvin Feuerhahn, John Eggemann, Louisa Wessell, and Herman Daume, Appellants,

vs.

LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER and George S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, Members of said Board; Fred Goyert and Clarence L. Grant, Respectively Clerk of the County Court and Collector of Revenue of Cape Girardeau County, Missouri, Respondents.

The petition of Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden & C. G. Cox, four of the above named appellants, (hereinafter called petitioners) by Giboney Houck and Davis & Hardesty, their attorneys, hereby sets forth that on or about February 12, 1913, the Supreme Court of the State of Missouri made and entered final order and judgment herein in favor of the above named respondents, and against these petitioners, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these petitioners, all of which will more in detail appear from the assignment of errors hereto attached and made a part hereof; that the Supreme Court of the State of Missouri is the highest Court of the State of Missouri in which a decision in this suit and this matter could be had.

Wherefore, these petitioners pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Missouri for the correction of errors so complained of, and that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 10th day of November, A. D. 1913.

GIBONEY HOUCK AND
DAVIS & HARDESTY,
Attorneys for Petitioners
or Plaintiffs in Error.

[Endorsed:] Filed Nov. 10, 1913. J. D. Allen, Clerk.

60 The Supreme Court of the State of Missouri.

16546.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; CHARLES J. Juden and C. G. COX, John Job, Louis Keller, C. F. W. Daume, Joseph Schaeffer, Alvin Feuerhahn, John Eggemann, Louisa Wessell, and Herman Daume, Appellants,

vs.

LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, and George S. Hanford, Respectively President and Secretary of the Board of Supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson, and A. L. Harty, Members of said Board; Fred Goyert and Clarence L. Grant, Respectively Clerk of the County Court and Collector of Revenue of Cape Girardeau County, Missouri, Respondents.

Assignment of Errors.

Now come Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden and C. G. Cox, four of said appellants, as petitioners for a writ of error as set out in their petition hereto attached, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled matter there is manifest error in this, to-wit:

(1) By Section # 5538 of the Revised Statutes of Missouri for 1909, the State of Missouri assumes and seeks to impair the obligation of a contract in favor of plaintiffs in error, to-wit: The contract provided by Section # 8251 of an Act of the General Assembly of Missouri, approved April 8th, 1905, (now Section # 5496 of the Revised Statutes of Missouri for 1909) under which contract a majority in interest procured a judgment incorporating said drainage district on November 30th, 1907, and the Supreme Court of Missouri erred in holding that said section # 5538 does not impair the obligation of any contract and erred in holding and adjudging that said section # 5538 is not in conflict with or in violation of Section 10, of Article I of the Constitution of the United States, prohibiting any State from passing any law impairing the obligations of contracts.

(2) By said Section # 5538 of the Revised Statutes of Missouri for 1909, the State of Missouri assumes and seeks to deprive plaintiffs in error of their private property for public use without compensation and without due process of law, and the Court erred in holding that said Section #5538 is not in conflict with or in violation of Section 1, of Article XIV of the Amendments of the United States Constitution, prohibiting any State from depriving any person of property without due process of law.

(3) By said Section #5538 the State of Missouri assumes and seeks to abridge the privileges and immunities of certain citizens of the United States and of the State of Missouri, to-wit: Appellants, and to deny appellants (who are persons within the jurisdiction of

the State of Missouri) the equal protection of the laws, and the Court erred in holding that said Section # 5538 is not in conflict with or violation of Section I of Amendment 14 to the United States Constitution, prohibiting any State from making or enforcing any law abridging the privileges or immunities of citizens of the United States, and prohibiting any State from denying to any person within its jurisdiction the equal protection of the laws.

(4) By said Section # 5538 the State of Missouri assumes and seeks to take property of plaintiff in error for public use without compensation and without due process of law, and the Court erred in holding that said Section # 5538 is not in conflict with
61 or in violation of Article V of the Amendments to the United States Constitution, providing that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without compensation.

(5) The Court erred in entering a judgment which denies plaintiffs in error of their rights provided in each and all of the above mentioned provisions of the Constitution of the United States.

(6) The Court erred in adjudging that said Section # 5538 is a valid law under the Constitution of the United States and not in conflict with any provision of the United States Constitution.

GIBONEY HOUCK AND
DAVIS & HARDESTY,
Attorneys for Appellants (Petitioners).

On the back of the above is marked: "Filed November 10th, 1913. J. D. Allen, clerk."

62 *Bond.*

Know all men by these presents, that we, Louis Houck and Mary H. G. Houck, his wife, Charles Juden and C. G. Cox as principals, and Louis B. Houck and Giboney Houck, as sureties, are held and firmly bound unto The Little River Drainage District; John H. Himmelberger and Geo. S. Hanford, respectively president and secretary of the board of supervisors of said District; A. J. Matthews, S. P. Reynolds, C. W. Henderson and A. L. Harty, members of said board; Fred Goyert and Clarence L. Grant, respectively Clerk of the County Court and Collector of revenue of Cape Girardeau County, Missouri, hereafter called respondents, in the sum of One Thousand Dollars, to be paid to the Respondents, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents signed with our seals and dated this 10th day of November, A. D. 1913.

The condition of the above obligation is such, that whereas at the October Term, 1912, of the Supreme Court of Missouri, in a suit pending in said Court between Louis Houck et al., appellants and the Little River Drainage District et al., respondents, judgment was rendered against the said appellants, and said appellants Louis Houck and Mary H. G. Houck, his wife, Charles J. Juden and C. G. Cox having obtained a writ of error from the Supreme Court of the

United States to the Supreme Court of the State of Missouri to reverse the judgment in the aforesaid suit and a citation directed to the said respondents citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now therefore, if the said appellants shall prosecute said writ to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation is to be void, otherwise to remain in full force and effect.

CHARLES J. JUDEN AND
C. G. COX,
By DAVIS & HARDESTY,
Their Attorneys.

LOUIS HOUCK. [SEAL.]
MARY H. G. HOUCK. [SEAL.]
LOUIS B. HOUCK. [SEAL.]
GIBONEY HOUCK. [SEAL.]

Sealed and delivered in the presence of
BENSON C. HARDESTY.

Approved by
HENRY LAMM,
Chief Justice of the Supreme Court of Missouri.

On the back of the above is marked: "Filed Nov. 10th, 1913. J. D. Allen, clerk."

63 In the Supreme Court of Missouri, October Term, 1913.

STATE OF MISSOURI, *set:*

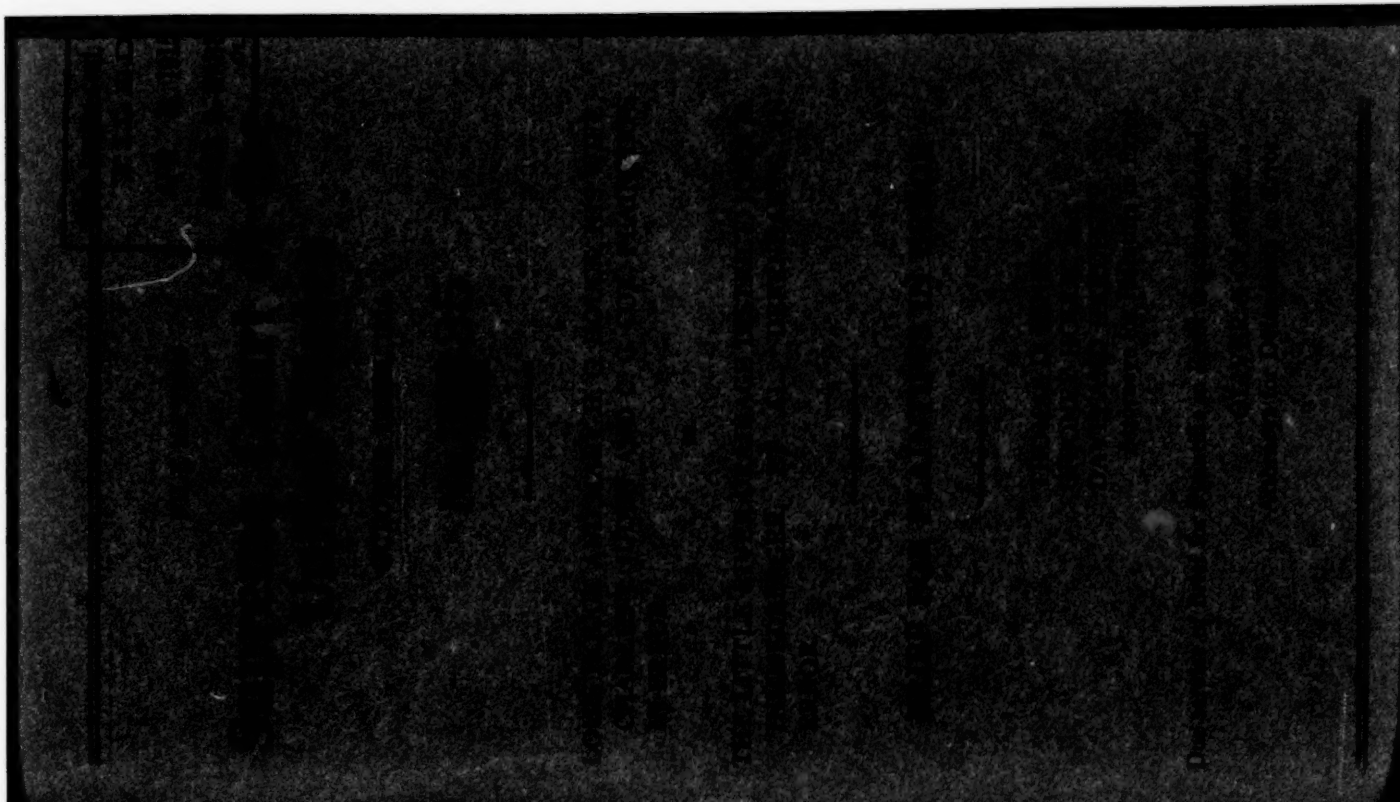
I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri do hereby certify that the foregoing is a full true and correct copy of the proceedings in this Court, in the afore styled case, together with all papers, record entries, etc., as set out in the præcipe hereto attached, as fully as the same appear of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court. Done at office in the City of Jefferson, this 22nd day of November, 1913.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 23,960. Missouri Supreme Court. Term No. 308. Louis Houck and Mary H. G. Houck, his wife; Charles J. Juden, and C. G. Cox, plaintiffs in error, vs. The Little River Drainage District, John H. Himmelberger et al. Filed December 10th, 1913. File No. 23,960.



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FILE No. 23960.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 308

LOUIS HOUCK AND MARY H. G. HOUCK, HIS WIFE; CHARLES J. JUDEN AND C. G. COX, PLAINTIFFS IN ERROR,

vs.

THE LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT.

Plaintiffs in error brought a suit to enjoin the collection of an assessment levied against their lands under section 5538 R. S. of Missouri, 1909. The suit was instituted in the Cape Girardeau Court of Common Pleas of Cape Girardeau county, Missouri, returnable to the November, 1910, term of that Court. On the application of defendants, the venue was changed to the Circuit Court of said county, where the case was tried and judgment rendered for defendants at the January, 1911, term.

In their AMENDED PETITION (Transcript, p. 11) plaintiffs allege their ownership of the land, embracing several thousand acres in Cape Girardeau county; that

the Little River Drainage District was incorporated November 30, 1907; that since its incorporation the district has appointed a board of engineers and adopted a plan of drainage, procured the appointment of commissioners, and that the commissioners have begun their work and are still engaged therein; that the avowed purpose for which the district was organized was the protection of the lands in the district from water, by actual work of excavation and construction; that all the proceedings are, as to the plaintiffs, *in invitum*; that no actual work of drainage has been done and no benefits have been conferred on plaintiff's land; that the only work so far done is of a preliminary character, which has been done at the instance of the district and the majority in interest therein and against the will of plaintiffs; that no benefits can result to plaintiffs' land by the collection or disbursement of the tax which has been levied by the district at the rate of 25c per acre on plaintiffs' land and all other land in the district; that the tax was levied without regard to the relative benefits to the various tracts in the district or to any benefits, and even without regard to the fact that a large portion of land in the district will be condemned for retaining basins, floodways, etc., and yet the owners of the land will be compelled to pay this preliminary tax on land, which at the same time is being taken from them by condemnation; that the levy of the preliminary tax has been made and that the collector of Cape Girardeau county is proceeding with the collection of the tax and threatening to collect the same by enforcing the lien thereof and seizing and selling the lands of the plaintiffs; that the only foundation for the levy is an act designated as Sec. 5538 R. S. of Mo., and enacted in 1909; that the act is in contravention of various sections of the constitution of the State of Missouri and of the constitution of the United States; that it is unconstitutional and void; that on account the unconstitutionality of the law, plaintiffs have refused to pay the said preliminary tax, and that in consequence of such refusal they are about to be subjected to irreparable injury; that a cloud is being set upon their titles; that their lands are about to be seized and sold and that they have no adequate remedy at law. The petition prays for an injunction against the collection of the tax and that said section 5538 be declared unconstitutional and void and that they be given all proper relief.

The defendants filed a DEMURRER (Transcript, p. 16) to this amended petition on the sole ground that it did not state facts sufficient to constitute a cause of action. Thereafter this STIPULATION was made and filed herein: (Transcript, page 16.)

> 'It is admitted that the only question in controversy in this cause is as to the constitutionality of section 5538 of the R. S. of Mo. 1909.
>
> "If the Court should find on demurrer to plaintiffs' petition that section 5538 is a valid and legal section under the constitution of Missouri and of the United States, the demurrer should be sustained and plaintiffs' bill dismissed.
>
> "If, on the other hand, the Court shall find said section violates either the constitution of Missouri or of the United States, then said demurrer should be overruled and judgment entered accordingly. Each party reserves the right to appeal from the judgment of the said Circuit Court."

The cause was submitted to the Circuit Court on the amended petition, the demurrer and the stipulation, and in due time the Circuit Court decided the issues thus presented in favor of the defendants, sustained the demurrer and entered judgment accordingly.

The plaintiffs filed their motions for a new trial and in arrest of judgment, saved their exceptions to the overruling of same and duly appealed the case to the Supreme Court of Missouri, which Court advanced the case on its docket; and on a due hearing of the case in Division No. 1, the Missouri Supreme Court rendered its JUDGMENT AND DECISION against these plaintiffs in error, on November 30th, 1912. (Transcript p. 21.) Thereupon, on motion, the cause was duly transferred to the Court en Banc on the ground that a question arising under the United States Constitution was involved therein (Transcript pp. 30-32), and the MISSOURI SUPREME COURT EN BANC, being the highest Court in the State of Missouri in which there could be an adjudication on said Constitutional question, having duly heard the cause, by a majority vote again decided the case against these plaintiffs in error and upheld the validity of said tax under the Federal Constitution, as well as under the State Constitution, (Transcript p. 33). Thereupon, these plaintiffs in error, in due time, filed their MOTION FOR A

REHEARING of the cause, which motion was, on March 1st, 1913, overruled by a majority vote of the Missouri Supreme Court en Banc. (Transcript pp. 33-35.)

Thereafter, on November 10th, 1913, these plaintiffs in error sued out of this Court a writ of error to the Supreme Court of Missouri, which was duly allowed, and the entire record of the cause duly brought before this Court for review, as appears from the following record entry of the Supreme Court of Missouri, to-wit: (Transcript p. 37.)

> "Now on this 10th day of November, A. D., 1913, come said appellants and present to the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in chambers, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors attached to said petition; also a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri; also a citation directed to said respondents, citing and admonishing them to appear at the Supreme Court of the United States not exceeding thirty days from and after the date of this citation; also a bond in the sum of one thousand dollars which said petition, together with the assignment of errors attached thereto, is filed, said writ of error allowed, said citation signed, and said bond approved and ordered filed."

The question now before this court is whether Section 5538, R. S. Mo., is in conflict with the various provisions of the federal constitution hereinafter pointed out. The said Section 5538 is *in pari materia* with various other sections of the drainage law of Missouri, so we now set out below not only the said Section 5538, but such other sections and portions of sections of MISSOURI DRAINAGE STATUTES as are necessary to a proper understanding of said Section 5538. We shall hereinafter discuss the radical change Section 5538 made in the drainage law and for convenience of illustrating that change, we have paralleled said section 5538 with that section of the statutes which provided how organization expenses had to be paid, prior to the enactment of said Section 5538.

"**Sec. 5496. Formation of drainage districts.**—A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated: * * * * and said articles shall further state that the owners of real estate within said district whose names are subscribed to said articles, are willing and do obligate themselves to pay the tax or taxes which may be assessed against their respective lands to pay the expenses of organization and of making the improvements that may be necessary to effect the drainage of said land * * * *. After said articles of association shall be signed, the same shall be filed in the office of the circuit court of the county in which such drainage district is located. * * * * (R. S. 1899, § 8251, amended, Laws 1905, p. 190.)"

"**Sec. 5538. Levy of 25 cents per acre may be made for preliminary work. — As soon as any drainage district shall have been organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power and authority to levy upon each acre of land in the district, not to exceed twenty-five cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the opinion of its board of supervisors it be desirable to do so, make such level assessments for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work proposed may have failed or have been found impractical.** (Laws 1909, p. 628.)"

"**Sec. 5497. Summons and notice to land owners.**—Immediately after such articles of association shall have been filed, the clerk of the circuit court of the county in which the pro-

posed drainage district is situate * * * * shall issue a summons, as now provided by law, returnable to the next term of the circuit court, directed to the several owners of real estate in said proposed district who have not signed said articles of association, or who may not have entered their appearance, in said circuit court, which shall be served as summons in civil cases. * * * * (R. S. 1899, Sec. 8252, amended, Laws 1905, p. 190.)"

"Sec. 5498. *Id.* Summons to contain what and how served.—In issuing summons or notice, as provided by section 5497 of this article * * * * it shall be sufficient to issue a summons under the hand of the clerk and the seal of the court to the respective owners of real estate in said proposed drainage district, who have not signed said articles of association, stating therein that articles of association have been filed with said clerk for the organization of a drainage district under the provisions of this article, setting out the name of said proposed drainage district, and its location as to county, township and range only, and further setting out the fact that the lands of the owner, or owners, to whom said summons is issued, are affected by the organization of said proposed drainage district. Said summons shall command said owner, or owners, named therein, to be and appear at the next term of the circuit court of the county wherein said articles are filed, and show cause, if any there be, why said district, as set out in said articles of association, shall not be organized as a public corporation. * * * (Laws 1907, p. 340.)"

"Sec. 5499. Objections—procedure.—Any owner of real estate in said proposed district, who may not have signed said articles of association, may object to the organization and incorporation of said drainage district, after having been duly summoned, shall on or before the first day of the term of the court to which he may have been summoned to appear, and file his objection, or objections, if any he have, why such drainage district should not be organized and incorporated, or why his land, or any part thereof, will not be benefited by the proposed drainage, or should not be embraced in said drainage district, and made liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without unnecessary delay, and in case all such objections are overruled, the circuit court shall by its

order, duly entered of record, duly declare and decree said drainage district a public corporation of this state for a term not exceeding the time mentioned in the said articles of association signed and filed. In case any owner of real estate included in said district shall satisfy the court that his real estate, or any part thereof, has been wrongfully included therein, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited and declare and decree the remainder a district as prayed. * * * * (R. S. 1899, Sec. 8253, amended, Laws 1905, p. 190.)"

"**Sec. 5511. Board to appoint chief engineer and assistants —their duties.**—After the board of supervisors of any drainage district organized as aforesaid, has been elected as in the preceding sections prescribed, the said board shall appoint * * * the "board of engineers." * * * The said "board of engineers" shall make a complete topographical survey of the said district and submit the same to the board of supervisors with maps and profiles of said survey and a full and complete plan for draining and reclaiming the lands * * * * * * the physical characteristics and location of any right of way, roadbed, bridge or bridges and other property or improvements in said district belonging to or under the control of any railroad company; and shall also report the location of any and all public highways which may be crossed by the right of way of any ditch, levee or other improvement planned for said district, together with the estimated cost of bridges and approaches across said highway and made necessary by reason of the aforesaid improvements and drainage. (R. S. 1899, Sec. 8259, amended, Laws 1905, p. 190.)"

"**Sec. 5512. Board of engineers to make report—adoption of plan.**— * * * (Laws 1905, p. 190.)"

Sec. 5513. Supervisors—powers and duties.—* * * * Said board of supervisors shall also have power to construct and maintain main or lateral ditches, canals, **levees, dams, sluices, reservoirs, holding basins and floodways in or out of said district,** which, in the judgment of said board, will be necessary to drain and reclaim any of the lands in said district or to prevent the same from being overflowed or damaged by water. * * * * Provided further, that the district shall not be authorized to enter upon or appropriate any right of way, sluiceway, reservoir or holding basin until the damages awarded by said commissioners are paid the clerk of

said court for the use of the parties interested, and if the damages are not so paid within five years from the filing of such commissioners' report, all proceedings as to the right of way not so paid for shall abate at the cost of said district; and provided further, that whenever the commissioners award to any owner of land, as damages to said land, the full market value of such land, and the amount of such award is paid for by said district, then, and in that event, the title, use, possession and enjoyment of said land so condemned shall pass from said owner and be vested in said district, and subject to its use, profit, enjoyment and final disposition in the same manner and with like effect as lands belonging to the county. (Laws 1905, p. 190, amended, Laws 1907, p. 345; Laws 1909, p. 620.)"

"**Sec. 5514. Secretary of board to file copy of plan with circuit court—duty of board.**—Within twenty days after the adoption by the board of supervisors of the aforesaid 'plan for drainage' provided for in section 5512, the secretary of said board shall prepare and file a certified copy thereof with the clerk of the circuit court having jurisdiction of said drainage district, as aforesaid, and at the same time the board of supervisors shall file with the said clerk of the circuit court a petition asking the judge of said court to appoint commissioners for viewing said lands and assessing benefits and damages, as hereinafter provided. Within thirty days after the filing of such petition the judge of said court, either in term time or in vacation, shall, by an order, appoint three commissioners, who shall be freeholders, residing within the county or counties in which said district is located, and who shall not be land owners in said district nor of kin within the fourth degree of consanguinity to any person owning land in said district. The said commissioners shall act together as a board of commissioners in assessing the benefits and damages to the land and all other property situated and being in said district and benefited or damaged by reason of the construction of any ditch, drain, dike, levee or other works and improvements of said districts. (R. S. 1899, Sec. 8260, amended, Laws 1905, p. 190; Laws 1909, p. 623.)"

"**Sec. 5515. Board of commissioners organized, how—duties of circuit clerk.**—The clerk of said circuit court shall upon the filing of said order of appointment, notify, by written or printed notice, each of said commissioners of his ap-

pointment, and in the same notice shall appoint a time and place for the first meeting of said commissioners. At such meeting the secretary of the board of supervisors or his deputy shall attend, and shall furnish to said commissioners a complete list of the lands and all corporate property embraced in said district and the names of the owners thereof, as they appeared at the date of the final decree of the court in the organization of said district, and also a copy of the 'plan for drainage' and the topographical survey of said district. The commissioners at said meeting, or as soon thereafter as possible, and before they enter upon their duties, shall each take and subscribe to an oath in writing that they will faithfully and impartially discharge their duties as such commissioners and will make a true report of the work done by them. The said commissioners shall also at said meeting elect one of their own number as chairman and the secretary or his deputy of the board of supervisors shall, *ex officio*, be the secretary of said commissioners during their continuance in office. (R. S. 1899, Sec. 8261, amended, Laws 1905, p. 190.)"

"**Sec. 5516. Commissioners to inspect districts and assess benefits and damages.**—The commissioners shall, as soon after their first meeting as possible, go over and inspect and examine the lands in said district. * * * * They shall assess, as hereinafter directed and according to the rules hereinafter prescribed, the amount of benefits which will accrue to each tract or parcel of land and corporate property above named, by virtue of the works and improvements of said drainage district; they shall also, where a right of way is necessary for any of the improvements or works contemplated in the 'plan for drainage,' assess the amount of the benefits which will accrue to the tract of land through which the right of way is necessary, and also assess the fair cash value of the land necessary to be taken and used for such right of way and improvements, and deduct such actual vale from such benefits, and the difference shall be the benefits assessed to the tract of land, and where the value of the land necessary to be taken and used exceeds the benefits, then the amount of **such excess shall be specified as damages**, in the report of said commissioners. In case the whole tract of land is necessary and is taken and used, then the fair cash value of said lands shall be specified as damages in said report. Each tract or parcel of land * * * * within the district shall bear its share of the entire cost and expenses incurred by said district in mak-

ing said works and improvements in proportion to the benefits assessed, whether such improvements be made on the tract or parcel of land * * * * or not. The commissioners, in estimating the benefits to lands * * * * not traversed by such works and improvements, shall not consider what benefits will be derived by said lands after other ditches, improvements, or drainage plans shall be constructed, but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage, or an outlet for drainage, or protection from overflow or damage by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, and no lands lying below shall be assessed for the benefits of lands above, but all assessments shall be made on the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water. In estimating benefits and damages the commissioners shall take into consideration any other drain or drains, ditch or ditches, levee or levees or system of drainage in said district which have already been constructed. **The taxes levied and assessed to pay for such works and improvements in said drainage district shall in no case exceed the benefits assessed.** * * * *Said report of commissioners shall contain a statement of the estimated cost of the works and improvements to be made in said district for the protection and reclamation of the properties above named, situated and being in said district, and shall also contain a description of all the lands in said district, and the names of the owners thereof. * * * * Opposite each tract of land * * * * shall be written the amount of the assessed benefits to it, in a column so headed, and in another column the amount of damages, if any, assessed against it, which report shall be signed by a majority of the commissioners and filed with the clerk of said circuit court organizing said drainage district. * * * * (R. S. 1899, Sec. 8262, amended, Laws 1905, p 190.)"

"**Sec. 5517. Notice by publication.**—Upon the filing of the report of the commissioners the clerk of said circuit court shall give notice thereof by causing a publication to be made, once a week for three consecutive weeks in some newspaper published in each county in the district. * * * * (R. S. 1899, Sec. 8263, amended, Laws 1905, p. 190.)"

Sec. 5518. Complaints heard and determined by circuit court—other procedure.—The drainage district, or any owner of land or other property in said district, may file exceptions to said report to any assessment for either benefits or damages, within ten days after the last day of publication of the notice provided for in the preceding section. All exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of such drainage district. If no exceptions are filed, or if filed, and overruled, the court shall approve and confirm the report, but if the report is amended or modified the court shall render a decree accordingly. * * * * (Laws 1905, p. 190.)"

"**Sec. 5519. Levy of tax to pay cost of drainage.**—As soon as the list of lands, with the assessments and the decree and judgment of court, have been filed in the office of the county clerk, as provided in section 5518 of this article, then the board of supervisors shall at once levy a tax on the lands in said district to which benefits have been assessed, equal in amount to the cost of such drainage works and improvements as estimated by the aforesaid commissioners, plus the actual expenses of organizing said district, the probable working and administrative expenses and damages (as estimated by the board of supervisors) in the completion of said works and improvements and the carrying out of the objects of said district. The said costs shall be apportioned to and levied on each tract of land or property in said district in proportion to the benefits assessed and not in excess thereof. * * * * (Laws 1905, page 190, amended laws 1909, page 624.)"

As heretofore stated, we have paralleled Section 5496 and Section 5538 in order to show what a drastic change Section 5538 made in the Missouri drainage law. During the last session of the Missouri Legislature, which began January 4th, 1915, and ended March 22nd, 1915, it enacted a law in which **unfair** and **illegal** features of the character herein complained of were eliminated. This new law was introduced into the General Assembly of the State of Missouri on January 25th, 1915, in House Bill No. 651. The bill was unanimously passed by both the House and the Senate, and the part in question is now a section of the **county** court drainage law of Missouri, as follows:

Sec. 5583a. Levy of uniform tax to pay cost of organization, etc.—The county court as soon as any drainage district has been organized under the provisions of section 5583, Revised Statutes of 1909, as amended by the 47th general assembly by an act approved March 27, 1913, shall levy a uniform tax of not more than fifty cents per acre upon each acre of land within such district, to be used for the purpose of paying expenses incurred or to be incurred in organizing said district, making surveys of the same and assessing benefits and damages and to pay other expenses necessary to be incurred before said court shall be empowered to sell bonds and thereby provide funds to pay the total cost of works and improvements of the district. Said tax shall be due and payable as soon as assessed and if not paid by December 31 of the year in which it has been levied, the same shall become delinquent. It shall become a lien on the land and other property against which it is assessed and shall be collected in the same manner as the annual installment of ditch tax. In case the sum received from such assessment exceeds the total cost of items for which the same has been levied, the surplus shall be placed in the general fund of the district and used to pay cost of construction: **Provided; that if the report of the viewers assessing benefits and damages to the property, as confirmed by the court, shows any tract or tracts of land on which such uniform tax has been paid, will not be benefited by the ditch or other works the county court shall issue a warrant on the district fund in favor of such landowner or landowners to the amount of the uniform tax already paid.**

While setting out in this "Statement" the Missouri drainage law for the convenience of this Court, we deem it not inappropriate to call attention to the said Section 5583a (which is a part of the **county** court drainage laws) and likewise to call attention to a bill contemplating a like amendment to the **circuit** court drainage laws of the State of Missouri (the **circuit** court drainage laws being the laws involved in this suit). While this bill contemplating an amendment to the **circuit** court drainage law was not enacted into law (though it passed the House unanimously and was just ready to pass the Senate without objection when the Legislature finally adjourned) yet

it is well to observe the changes it contemplates in Section 5538, for it sought to eliminate **unjust** and **illegal** features of Section 5538, in question, and it, therefore, enables us to present, in this "Statement," clearly and succinctly the questions involved herein respecting the unconstitutional features of said Section 5538, so we here set out the section of the bill in question, being Section 11 of House Bill No. 753, introduced into the 48th General Assembly of Missouri on March 6th, 1915, as follows:

> Sec. 11. Levy of uniform tax to pay cost of organization.—Such tax to be refunded, when.—The board of supervisors of any drainage district shall, as soon as elected and qualified, levy a uniform tax of not more than fifty cents per acre upon each acre of land within such district, to be used for the purpose of paying expenses incurred or to be incurred in organizing said district, making surveys of the same and assessing benefits and damages and to pay other expenses necessary to be incurred before said board shall have power to levy the total tax and issue bonds to pay the total cost of works and improvements of the district. In case the boundary lines of the district be extended so as to include additional lands and other property, the same uniform tax shall be levied on the lands and other property added or annexed. Such tax shall be due and payable as soon as levied and if not paid by December 31 of the year in which it has been levied, the same shall become delinquent and bear a penalty of two per cent per month. It shall become a lien on the land and other property against which it is levied and shall be collected in the same manner as the annual installment of tax. In case the sum received from such assessment exceeds the total cost of items for which the same has been levied, the surplus shall be placed in the general fund of the district and used to pay cost of construction. If the corporation of the district be dissolved, as provided for in a subsequent section, the surplus, if there be any, shall be prorated and **refunded to the land owners paying such uniform tax. In case the commissioners' report assessing benefits and damages, as confirmed by the court, shows any lands included in the district as incorporated will not be benefited by "the plan for reclamation," the board of supervisors**

> **shall issue warrants in favor of the owners of such lands who have paid said uniform tax equal to the amount of uniform tax paid, and order the county collector to cancel the unpaid portion of uniform taxes assessed against lands not benefited.** Provided, that there shall be no such refunding of the uniform tax in districts organized prior to the passage of this act by the 48th Missouri general assembly.

The amended petition (Transcript pp. 13-14) avers "That a large portion of lands of said district, and in particular, a large portion of the lands of these plaintiffs, is by said district to be condemned for rights-of-way for ditches, channels and catch basins of the proposed system of drainage; * * * * that said tax has been levied against every acre of land in said district, and in particular, against all the said lands of these plaintiffs, as a flat or level tax at the rate of 25c per acre without regard either to the relative value * * * * or to the fact that no benefit will be rendered to any of said tracts, * * * by the carrying out of the proposed scheme of drainage, or that other portions will be damaged, or that other portions will be taken from these plaintiffs by condemnation, as aforesaid."

These allegations were, of course, confessed by the demurrer and, therefore, stand admitted in the record, and, furthermore, comport with the exact truth of the situation, for more than one thousand acres of plaintiff's land in said county of Cape Girardeau have been condemned for retaining basins, diversion channels, and rights-of-way of this drainage district, and all this land, so condemned, is either actually taken away from plaintiffs, or else badly damaged by the district's easement, and yet, **behold, it** is impressed with the lien of this tax and liable to be siezed and sold in the enforcement of such lien.

It, therefore, appears on the face of the record in this case as made up by the amended petition, the demurrer and the stipulation, that **plaintiffs in error constitute a class of individuals who are injuriously affected by the said Section 5538; that their injury arises directly; and that their situation, as owners of a large amount of land that has been condemned for retaining basins and yet has been made liable for the collection of this preliminary tax, is distinct and different from that of persons whose lands will not be damaged. The record of the case,**

therefore, shows that if the plan of drainage fails, then, under Section 5538, plaintiffs in error will still be compelled to pay this tax, or special assessment, notwithstanding that their land can receive no benefit whatever therefrom; also that if the drainage plan should succeed, then, under Section 5538, plaintiffs will be compelled to pay this tax on a large amount of land that has been condemned for use of the drainage district and, therefore, will be damaged or absolutely taken away from plaintiffs, instead of being benefited. The record, therefore, conclusively shows that it will be impossible for plaintiffs to escape the inevitable result of being deprived of property for public use without compensation—that is to say, without any equivalent of benefits in return for the tax (special assessment) lien imposed on their land.

It will be observed that the stipulation provides that if said Section 5538 violates the constitution of the United States, then the judgment should be for the plaintiffs below, who are the plaintiffs in error in this court. The record discloses that the case was brought on but one theory, viz., that said Section 5538 is void under both the constitution of Missouri and the constitution of the United States. Under no circumstances could judgment have been entered herein against the plaintiffs without affirming the validity of said Section 5538 under both constitutions. Section 1 of the 14th amendment of the federal constitution was pleaded, in particular, as a provision prohibiting the enactment of such a law as Section 5538 in question. The amended petition (Transcript p. 11) avers that the Drainage District was incorporated November 30th, 1907, and that the law in question was not enacted until 1909, and the face of the record throughout the case shows that the final judgment entered against these plaintiffs in error necessarily involved an adjudication that said Section 5538 was not in conflict with Section 10, Article 1, of the constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts. The contract relied on by plaintiffs in error is the Charter of the Drainage District, being the law under which the District was incorporated, as set forth in Section 5496, *supra*, under which section the majority in interest were required to sign articles of association to the effect that they would pay the very expenses that have been subsequently,

by this Section 5538, imposed upon the minority in interest. The specification of errors hereinafter set out, shows in more elaborate form that the questions involved are:

> First: Is said Section 5538 in conflict with the provisions of the United States constitution, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws?
>
> Second: Is said Section 5538 in conflict with the provision of the United States constitution prohibiting any State from passing any law impairing the obligation of contracts?

As a part of this statement, we here set out the Assignment of Errors made on the application for the pending writ of errors, on each of which errors assigned, plaintiffs in error rely on this hearing in the Supreme Court of the United States. Said ASSIGNMENT OF ERRORS (Transcript pp. 39-40) is as follows:

> "Now come Louis Houck and Mary H. G. Houck, his wife; Charles J. Juden and C. G. Cox, four of said appellants, as petitioners for a writ of error as set out in their petition hereto attached, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled matter there is manifest error in this, to-wit:
>
> (1) By Section No. 5538 of the Revised Statutes of Missouri for 1909, the State of Missouri assumes and seeks to impair the obligation of a contract in favor of plaintiffs in error, to-wit: The contract provided by Section No. 8251 of an Act of the General Assembly of Missouri, approved April 8th, 1905, (now Section No. 5496 of the Revised Statutes of Missouri for 1909) under which contract a majority in interest procured a

judgment incorporating said Drainage District on November 30th, 1907, and the Supreme Court of Missouri erred in holding that said section No. 5538 does not impair the obligation of any contract and erred in holding and adjudging that said Section No. 5538 is not in conflict with or in violation of Section 10, of Article 1, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

(2) By said Section 5538 of the Revised Statutes of Missouri for 1909, the State of Missouri assumes and seeks to deprive plaintiffs in error of their private property for public use without compensation and without due process of law, and the Court erred in holding that said Section 5538 is not in conflict with or in violation of Section 1 of Article 14 of the Amendments of the United States Constitution, prohibiting any State from depriving any person of property without due process of law.

(3) By said Section 5538 the State of Missouri assumes and seeks to abridge the privileges and immunities of certain citizens of the United States and of the State of Missouri, to-wit: Appellants, and to deny appellants (who are persons within the jurisdiction of the State of Missouri) the equal protection of the laws, and the Court erred in holding that said Section 5538 is not in conflict with or in violation of Section 1 of Amendment 14 to the United States Constitution, prohibiting any state from making or enforcing any law abridging the privileges or immunities of citizens of the United States, and prohibiting any State from denying to any person within its jurisdiction the equal protection of the laws.

(4) By said Section 5538 the State of Missouri assumes and seeks to take property of plaintiff in error for public use without compensation and without due process of law, and the Court erred in holding that said Section 5538 is not in conflict with or in violation of Article 5 of the Amendments to the United States Constitution, providing that no person shall be deprived of

property without due process of law, nor shall private property be taken for public use without compensation.

(5) The Court erred in entering a judgment which denies plaintiffs in error of their rights provided in each and all of the above mentioned provisions of the Constitution of the United States.

(6) The Court erred in adjudging that said Section 5538 is a valid law under the Constitution of the United States and not in conflict with any provision of the United States Constitution."

FIRST SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that Section 5538 R. S. of Missouri, 1909, does not contemplate taking private property for public use without the compensation required by "due process of law" provided for in Section 1, Amendment 14, of the Federal Constitution.

(1) What may be done under this section construed in connection with all the Missouri drainage laws is the constitutional test to be applied, and plaintiffs in error are neither **estopped** nor **barred** from challenging this law.

Stuart vs. Palmer, 74 N. Y., 183, 191;
Agens vs. Mayor, 37 N. J. L., 416, l. c. 420-423;
Norwood vs. Baker, 172 U. S., 269;
No. Pac. Ry. vs. Pierce, 23 L. R. A. (N. S.), 286;
Little River Drainage District vs. St. L. M. & S. E. R. Co., 236 Mo. 94;
Rev. Stat. of Mo., 1909, Sec. 5496-5499, 5511-5519, 5538;
Charles vs. City of Marion, 98 Fed. Rep. 166;
Moss vs. Whitzel, 108 Fed. Rep. 579, 582;
Chicago, etc., R. Co. vs. Chicago, 17 U. S. Sup. Ct. Rep. l. c. 584-586;
Davidson vs. New Orleans, 96 U. S. 97 l. c. 104-105;
Cooley on Constitutional Limitations, pp. *356, *357;
2 Story Const., Sec. 1956 (Cooley's Ed.)

Squaw Creek Drainage District No. 1 vs. Turney, 235 Mo. 80;
Violett vs. Alexandria, 92 Va. 561;
Ohlmann vs. Clarkson Saw Mill Co., 222 Mo. 62;
Gist vs. Rackliffe-Gibson Const. Co., 225 Mo. 116;
Ross vs. Board of Supervisors, 128 Iowa l. c. 436.

(2) The avowed purpose and only possible legal purpose of Section 5538 is a public one and involves the **taking of private property for public use.**

Morrison vs. Morey, 146 Mo. l. c. 561-563, 584;
Mound City Land and Stock Co. vs. Miller, 170, Mo. l. c. 249-258, 240;
Chicago B. & Q. R. Co. vs. Illinois, 200 U. S. 561;
Egyptian Levee Co. vs. Hardin, 27 Mo. l. c. 496;
St. Louis vs. Oeters, 36 Mo. 456;
Ks. City vs. Ridenour, 84 Mo. l. c. 258-259;
St. Joseph vs. Anthony, 30 Mo. 537;
St. Louis vs. Rankin, 96 Mo. 497;
Independence vs. Gates, 110 Mo. 374;
Ks. City vs. Ward, 134 Mo. 172.

(3) "Due process of law" requires compensation for **private property taken for public use.**

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. l. c. 695, 17 U. S. Sup. Ct. Rep. l. c. 722;
Corrigan vs. Gage, 68 Mo. 541;
Albright vs. Fisher, 164 Mo. l. c. 68;
St. Louis vs. Theatre Company, 202 Mo. l. c. 699;
Chicago, etc., R. Co. vs. Chicago, 17 U. S. Sup. Ct. Rep. 581, l. c. 584, 166 U. S. 226, l. c. 241;
Norwood vs. Baker, 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269;
Chicago, B. & Q. R. Co. vs. Illinois, 260 U. S. 561.

(4) If the drainage plan should fail, there can then be no compensation of the character contemplated by due process of law.

Killy vs. Cranor, 51 Mo. 542;
14 Cyc. 1059;
Lipes vs. Hand, 104 Ind. 503;
Kansas City vs. O'Connor, 82 Mo. App. 655;
Chicago vs. Blair, 149 Ills. 310;
Ins. Co. vs. Prest, 71 Fed. Rep. 817;
Pettit vs. Duke, 10 Utah 311;
City of Owensboro vs. Sweeny, (Ky) 111 S. W. 364;
Stevens vs. Port Huron, 149 Mich. 536;
Kalamazoo vs. Crawford, (Mich.) 117 N. W. 572;
Washington Ice Co. vs. Chicago, 147 Ills. 327;
Kansas City vs. St. Louis & S. F. R. Co., 230 Mo. 369;
Hutt vs. Chicago, 132 Ills. 352;
Waukegan vs. Burnett, 234 Ills. 460;
Chicago vs. Kemp, 240 Ills. 56;
Lindblad vs. Normal, 224 Ills. 362;
Holdom vs. Chicago, 169 Ills. 109;
State vs. Elizabeth, 40 N. J. L. 274;
Guaranty & Title Co. vs. Chicago, 162 Ills. 505;
Re Park Ave. Sewers, 169 Pa. St. 433;
Edwards vs. Chicago, 140 Ills. 440;
City of Bridgeport vs. N. Y. & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63;
Wistar vs. Phila., 80 Pa. 505;
Re Market St., 49 Cal., 546;
Hanscom vs. Omaha, 11 Neb. 37;
Chamberlain vs. Cleveland, 34 Ohio St., 551;
Hartford vs. West M. D., 45 Conn. 462;
Cooley on Taxation, 416 C. 20 Par. 1; Id. 2nd Ed. 606, Par. 1;
Hammett vs. City of Phila., 65 Pa. St. 146;
Agens vs. Mayor, etc., 37 N. J. L. 416;
Davidson vs. New Orleans, 96 U. S. 97;
Loan Ass'n vs. Topeka, 20 Wall. 655;
McCormack vs. Patchin, 53 Mo. l. c. 36;
Norwood vs. Baker, 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269;
2 Dill. Mun. Corp., 4th Ed., p. 934, Par. 761;

Mobile County vs. Kimball, 102 U. S. 691, 703, 704, 26 L. Ed. 132, 136, 13 U. S. Sup. Ct. Rep. 293;

Bauman vs. Ross, 167 U. S. 548, 589, 42 L. Ed. 270, 288, 17 U. S. Sup. Ct. Rep. 966;

Spencer vs. Merchant, 125 U. S. 345;

Barber Asphalt Pav. Co. vs. French, 158 Mo. 534, 561;

Barber Asphalt Pav. Co. vs. French, 181 U. S. 324;

Parson vs. Columbia, 170 U. S. 54;

Heman vs. Schulte, 166 Mo. 409;

Corrigan vs. Gage, 68 Mo. 541.

SECOND SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that the enforcement of said Section 5538 will not take plaintiffs' property for public use without compensation—that is to say, without "due process of law."

(1) Even if the drainage plan should succeed, still no compensation can result so far as concerns the large area of plaintiffs' lands necessarily condemned for public use, and which same area is assessed with this tax.

Squaw Creek Drainage District No. 1 vs. Turney, 235 Mo. 80;

Hanscom vs. Omaha, 11 Neb. 37;

Chamberlain vs. Cleveland, 34 Ohio State 551;

Hartford vs. West M. D., 45 Conn. 462;

In Re Park Ave. Sewers, 169 Pa. St. 433;

Heman vs. Schulte, 166 Mo. 409;

Barber Asphalt Paving Co. vs. French, 158 Mo. 534;

Barber Asphalt Paving Co. vs. French, 181 U. S. 324.

THIRD SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that said Section 5538 is not retrospective so as to violate "due process of law."

State ex rel. vs. Haben, 22 Wis. 660;
Terrett vs. Taylor, 9 Cranch, 50;
Pawlett vs. Clark, 9 Cranch, 332;
Charles River Bridge vs. Warren Bridge, 11 Peters, 603;
Walla Walla vs. Walla Walla Water Co., 172 U. S., 9;
Bailey vs. Railroad Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593;
Edwards vs. Kearzy, 96 U. S. 595;
Muhlker vs. N. Y. & H. R. Co., 197 U. S. 544;
City of St. Louis to use vs. Clemens, 52 Mo. l. c. 144;
State ex rel Haeussler vs. Greer, 78 Mo. 188;
Fisher vs. Patton, 134 Mo. l. c. 53;
In Re Pell, 171 N. Y., 48;
State ex rel Pittman, et al, vs. Adams, et al, 44 Mo., 570;
Dartmouth College vs. Woodward, 4 Wheaton, 518;
Leete vs. State Bank, 115 Mo., l. c. 200-201;
Westervelt vs. Gregg, 12 N. Y., 202;
Norris vs. Bayea, 13 N. Y., 273;
Holmes vs. Holmes, 4 Barb., 395;
Ryder vs. Hulse, 24 N. Y., 372;
Sperry vs. Haslam, 57 Ga., 412;
Dunn vs. Sargent, 101 Mass., 336.

Fletcher vs. Peck, 6 Chanch 87;
Davis vs. Gray, 16 Wall. 203;
Fisk vs. Police, etc., 116 U. S. 131;
State vs. Police, etc., 111 U. S. 716;
Hall vs. Wisconsin, 103 U. S. 5;
Gordon vs. App. Tax Court, 3 Howard 343.

FOURTH SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that said Section 5538 does not violate Section 10, of Article 1 of the federal constitution prohibiting a state from passing any law impairing the obligation of contracts.

(See authorities cited under Third Specification of Error);

State ex rel Mulholland vs. Smith, 141 Mo., 1;

Kaukauma Co. vs. Green Bay, etc., Co., 142 U. S., 254;

Wilson vs. Black Bird Creek Marsh Co., 27 U. S., (2 Pet.) 245;

Armstrong vs. Athens County, 41 U. S., (16 Pet.) 281;

Chicago L. Ins. Co. vs. Needles, 113 U. S. 574;

Eureka Lake and Y. Canal Co. vs. Yuba County Super. Ct., 116 U. S., 410;

McGrew vs. Mo. Pac. Ry., 230 Mo., 496;

Ex Parte Siebold, 100 U. S., 371.

BRIEF OF ARGUMENT.

ON FIRST SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that Section 5538, R. S. of Missouri, for 1909, does not conflict with Section 1 of Amendment 14 of the Federal Constitution, which provides, among other things, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. UNDER THIS FIRST SPECIFICATION OF ERROR, we shall endeavor to show that said Section 5538 contemplates taking private property for public use without compensation, thereby violating the said constitutional provisions, and particularly the provision requiring DUE PROCESS OF LAW. Due process of law is the particular provision of Amendment 14, upon which depends all the argument under this specification of error. The remainder of the above mentioned provisions of Amendment 14 are but corollaries of the central idea, "due process of law." What is said below under subdivision (1) is chiefly preparatory to a precise and accurate application of the due process of law requirement to the record of this case at bar.

(1) In the first place, plaintiffs in error propose to test the constitutionality of said Section 5538 by demonstrating the wrongs which, under its provisions, may be committed. This is the cardinal test of the constitutionality of a law, as pointed out by the Supreme Court of New York in Stuart vs. Palmer, 74 N. Y., 183, where that court said:

> "The constitutionality of a law is to be tested not by what has been done, but what may, by its authority, be done."

See also Agens vs. Mayor, 37 N. J. L., 416, l. c. 420-423; Norwood vs. Baker, 172, U. S. 269.

With this character of test in mind, let us now consider carefully the statute that is to be tested, in connection with all other statutes that are kindred thereto. We have heretofore set out in the statement of this brief all those parts of the Missouri drainage laws which are necessary to an understanding of their general character. Sections 5511 to 5518 of the drainage laws provide for a complete plan of drainage to be filed in the Circuit Court having charge of the proceedings; for Commissioners to be appointed to assess benefits; for a report of the Commissioners on benefits and damages to be filed in the Circuit Court; for a notice to be given to the land owners in the district advising them of the filing of such report, and of their right to file exceptions thereto, and for the hearing of such exceptions by the Circuit Court. From the judgment of the Circuit Court, appeals may be taken in the usual manner, and no landowner in the district becomes liable to pay the tax provided for by section 5519 until final judgment has been entered confirming or modifying the Commissioner's report. The tax that is provided for in said section 5519 can, under such section, be levied on each tract only in proportion to the actual benefits that the tract will receive, as indicated by the assessment of the Commissioners, and under no circumstances can such tax be levied in excess of such actual benefits. This tax that is levied against the tract in proportion to the benefits received by each is the tax that pays for the cost of constructing the drainage system. However great that cost may be, no tract of land in the district can be taxed to pay the same in a greater amount than the benefits that are directly received by the tract as a result of the drainage work. These benefits, therefore, are the measure of the amount of tax that can be levied against the tract.

Examining Section 5538, however, we find that the tax therein provided for preliminary expenses may be levied and collected although the work proposed may have failed or have been found impractical. This clearly indicates that the legislature did not intend the benefit principle, illustrated in the foregoing section, to have any application in Section 5538.

In the next place, it is important to consider the position that plaintiffs in error occupy from the standpoint of assailing the constitutionality of this law. THEY ARE IN NO WAY ESTOPPED. It is important to note that the record shows the entire proceeding to be *in invitum* as to plaintiffs in error, and the tax under no circumstances can be con-

strued as SELF-IMPOSED, as was the preliminary tax upheld by the Supreme Court of the State of Washington, in No. Pac. Ry. vs. Pierce, 23 L. R. A., (N. S.) 286. The Washington Act of 1895, as amended in 1903, provides for the formation of a drainage district in the following manner: Any number of land owners residing within the proposed district may petition the county commissioners for the formation of a drainage district in such petition described. Then the commissioners publish the petition, together with an appropriate notice, setting a day for a hearing on the question as to whether or not the district ought to be established. No power of establishing such district, however, is vested in them. On the day of hearing, if they find that the proposed drainage would be conducive to the public health, convenience and welfare and would increase the general revenue and would be of benefit to the majority of the lands within the boundaries of the proposed district, the commissioners then record such finding and order an ELECTION (1) to determine the question as to the formation of the district, and (2) to elect three supervisors to take office in case the measure carries. The same provisions with regard to notice, clerks and judges of this election obtain as in case of a general state election in the State of Washington, and the same qualifications for electors exist, except that every elector must have been a resident of the proposed district 30 days prior to casting his vote. IF SUCH MEASURE CARRIES AT THE ELECTION, then the newly elected commissioners proceed with their official duties, which correspond largely to the duties of the supervisors under the Missouri law.

On the basis that when one consents to the formation of the government, he consents to a rule of the majority within any corporate limit duly established by the Legislature, the Supreme Court of Washington held in said No. Pac. Ry. case that a drainage district organization, under the law above set forth, is a voluntary organization, whose expenses are voluntarily assumed by its members, and that no act of the Legislature can be involved with regard to the collection of any taxes duly levied by such voluntary organization. That court expressly held, in that case in question, that no legislative act was involved in regard to the tax for preliminary expenses voluntarily assumed at an ELECTION held by the people living within the limits of the drainage district.

Furthermore, in challenging the validity of this law, PLAINTIFFS ARE IN NO WAY BARRED by the judgment incorporating this drainage district, as we shall now show.

The amended petition, which under the demurrer and the stipulation is taken as confessed, makes the chief part of the record in the case, and shows that the only judicial hearing that had been afforded prior to the levy of this tax was on a trial of the issues as to the organization of the district under Sections 5946 to 5499. It will be observed from Section 5499 that the only issues then triable were whether the district should be organized and what lands should be included. There was no requirement at that stage for any maps, profiles, estimates, plans or data of any kind or character showing the practicability, feasibility or possibility of the proposed drainage, or how such drainage will affect any particular land in the proposed district. In fact, there then can be no plans, for the district then is not organized or incorporated and no opportunity has then been given for selecting proper plans. Little River Drainage District vs. St. L. M. & S. E. R. Co., 236 Mo., 94. The only questions which the state is then determining are whether the land is wet and swampy land, whether it is susceptible of drainage, what its area is and whether any of it should be excluded from the district by reason of needing no drainage. The plans, maps, profiles, estimates and other data being impossible of determination at that time and not being required at all, it follows conclusively that no criterion or guide is given then wherewith to ascertain the amount of benefits which any tract of land in the district will receive. No proceedings are provided for any inquiry as to the amount of benefits, or for any report of commissioners, or for any judgment or decree of the Court as to the amount of benefits. Sectin 5499 expressly provides that the only decree to be entered on those proceedings is a decree incorporating the district and determining what lands are included therein. Not a land owner in the district then knows anything about the form or character of the system, and much less can he then know anything about the amount or character of damages or benefits which will be sustained by the carrying out of the scheme. In fact, the assessment of benefits and damages is expressly reserved for a later stage, where appropriate proceedings are provided for that purpose. Sec. 5511 to 5518, R. S. of Mo., 1909.

That the organization proceedings are not appropriate for determining any assessment of benefits or damages and were never designed for that purpose becomes still more manifest when we consider the legal requirements of such a judicial inquiry. It is settled beyond controversy that one of the most important elements of due process of law is that there shall be a tribunal clothed with power, by methods and rules prescribed by law, to hear and determine the question involved. Charles vs. City of Marion, 98 Fed. Rep. 166; Moss vs. Whitzel, 108 Fed. Rep. 579, 582. In Chicago etc. R. Co. vs. Chicago, 17 U. S. Supreme Court Rep. l. c. 585, the Court said:

> "Due process of law, as applied to judicial proceedings instituted for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

There must be a full opportunity to be heard. Davidson vs. New Orleans, 96 U. S. l. c. 104-105. Mr. Cooley, in his work on Constitutional Limitations, pages *356, *357, says:

> "In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession. * * * Due process of law in each particular case means 'such an exertion of the powers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' * * * In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse."

The judicial proceedings must be such as clearly and definitely to point out how the compensation is to be assessed. 2 Story Const., Sec. 1956 (Cooley's Ed.); Chicago etc. R. Co. vs. Chicago, 17 U. S. Sup. Ct. Rep. l. c. 586. "Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use would

be a mockery of justice." Chicago etc. R. Co. vs. Chicago 17 U. S. Sup. Ct. Rep. l. c. 584. No greater mockery of a judicial proceeding can be imagined than these organization proceedings (under said Secs. 5496-5499) as a judicial hearing for an assessments of benefits, for that is a purpose for which they were never designed or intended.

The proceedings for the incorporation of drainage districts, as set out in said Sections 5496 to 5499 inclusive, provide for the only hearing of any character that can be had under the Missouri law prior to an imposition of this preliminary tax under Section 5538, and the Missouri Supreme Court, in the case of Squaw Creek Drainage District No. 1 vs. Turney, 235 Mo., 80, settled the question that this hearing, provided for on the incorporation of the district, is not intended as a hearing on the subject of benefits, and does not subserve any of the purposes of such a hearing. The Missouri Supreme Court held that the provisions for the creation of a drainage district provide for NO FINAL ADJUDICATION, EXCEPT THAT THE DISTRICT BE INCORPORATED; that the determination of what lands are to be included, by reason of being susceptible to benefit from a drainage district, is nothing but a preliminary and tentative determination, and that Sections 5511 to 5518 are the sections which provide for the accurate and final determination of the benefits. Likewise, in Little River Drainage District vs. St. Louis, M. & S. E. R Co., 236 Mo., 94, the Misouri Supreme Court held that the purpose and scope of the organization proceedings, provided for by Sections 5496 to 5499, inclusive, are such that the constitutional exercise of the power therein given requires no notice whatever to any landowner in the district. In that case, the Missouri Supreme Court said:

> "It is not necessary to the constitutionality of the statute providing for the incorporation of the drainage district that any notice whatever should be given to the landowner in laying out and determining the district."

In that opinion the Missouri Supreme Court adopted and applied an excerpt of the opinion of the Supreme Court of Iowa in the case of Ross vs. Board of Supervisors, 128 Iowa, l. c. 436, as follows:

> "Appellant takes the position that the landowner is entitled to notice and hearing as to the extent of this

district, and whether his land shall be included therein, and that the failure to provide for such notice and hearing renders the statute unconstitutional. In our opinion, the objection is unsound. The division of a state or lesser municipal territory into districts for the purpose of taxation or public improvements is a legislative matter, and the citizen affected thereby cannot complain because the power is exercised without notice to him."

It, therefore, inevitably follows that those organization proceedings provided for in Sections 5496 to 5499, inclusive, have nothing whatever to do with any assessment of benefits and furnish no legal authority for the preliminary tax in question, for all the courts hold that there should be such notice to a person of any PROCEEDINGS TO TAX HIS PROPERTY as is appropriate to the nature of the case. Davidson vs. New Orleans, 96 U. S., 97; Stuart vs. Palmer, 74 N. Y., 191; Violett vs. Alexandria, 92 Va. 561.

There ought, therefore, to be no room for argument that the provisions of Sections 5496 to 5499, inclusive, relative to organizing drainage districts, have nothing whatever to do with the levy of any assessment for benefits, since that point appears on the face of the decisions in question, and has been so construed by the Missouri Supreme Court, and since the courts of practically all jurisdictions have held that proceedings of that character are not such as to constitute due process of law for levying any assessment of benefits.

We have so far given very full discussion to the provisions of the Missouri drainage law providing for the organization and boundaries of a drainage district, and to the construction placed upon these provisions by the Missouri Supreme Court, itself, as well as the construction placed upon similar provisions by the courts generally, and we have done that for the purpose of showing the length to which the Missouri Supreme Court went in the decision of this case at bar, in order to uphold the validity of this law in question, for in its opinion in this case (Transcript p. 27) the Missouri Supreme Court said:

"We have already shown that the legislature had the power to fix the boundaries of the district to be benefited by the work by referring the same to judicial ascertainment, and that, HAVING DONE THIS, ITS POWER EXTENDED TO THE LEVY OF

> A TAX by special assessment upon the entire property of the district SO ASCERTAINED TO BE BENEFITED, to be distributed in such manner as, in the legislative judgment, would secure equality. It no longer lay in the mouth of the owner of the included property to deny that he was benefited to the extent of the burden so imposed, whether by a uniform assessment founded upon the unit of area, or by attempting to differentiate the peculiar conditions pertaining to each tract. In this case the legislature combined the two, and in so doing was equally within its powers. The last clause of the section in dispute gives no warrant for the discontinuance of the work. It simply recognizes, as the Court would recognize had it not been written, that after expensive preliminary work such enterprises may possibly be found unfeasible, and that unforseen accidents or conditions, either physical or financial, frustrate the wisest plans."

That was said by the Missouri Supreme Court in the face of its decisions in Squaw Creek Drainage District vs. Turney, and in Little River Drainage District vs. St. Louis M. & S. E. R. Co., *supra*, and was in the face of its decision in the case of Ohlmann vs. Clarkson Saw Mill Co., 222 Mo., 62, where it said:

> "No man may judicially lose his property without his day in court. A day in court proceeds on notice. So, due process of law and jurisdiction depend on notice."

Likewise, in the case of Gist vs. Rackliffe-Gibson Const. Co., 225 Mo., 116, the Missouri Supreme Court said:

> "But it is argued that plaintiff was denied due process of law. Section 30, Article 2, Constitution, reads: 'That no person shall be deprived of life, liberty or property without due process of law.' Special assessments for local improvements are referable to the taxing power. Publications of notice to the property owners, and opportunity to be heard before the tribunal having the duty of ascertaining the facts and acting in the special assessment procedure, satisfies the constitutional requirements and is due process of law as to those matters."

Davidson vs. New Orleans, 96 U. S., 97, clearly illustrates the futility of the incorporation proceedings as a basis for determining any benefits authorizing the levy of this tax. In the Davidson case, a tableau of assessments was duly filed in the district court setting forth an assessment of certain real estate, made for draining swamp lands. As was provided by law, Davidson filed exceptions to the assessment, which exceptions were ultimately overruled and the assessment confirmed, and Mr. Justice Miller, in affirming the constitutionality of that procedure, held that whenever by State authority a tax, assessment, servitude, or other burden is imposed upon property for public use, whether it be for the whole State or for some more limited portion of the community, and the law provides for a mode of confirmation or contesting THE CHARGE thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to his property as is appropriate to the nature of the case, such proceedings cannot be said to deprive the owner of his property without due process of law.

In Stuart vs. Palmer, 74 N. Y. 191, the question of a special assessment of benefits for expenses incurred in opening and grading a street was considered. The case was closely analogous to the case at bar, for Stuart brought a suit to enjoin and restrain the collection of the assessment, the chief ground being that the law required no notice and none, in fact, was given to him. The Court of Appeals of New York held the act authorizing the assessment unconstitutional and vacated the assessment, because it was made without notice to Stuart and therefore deprived him of his property without due process of law. In the course of its opinion the Court said:

> "It has always been the general rule in this country in every system of taxation to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That due process of law requires this has been quite uniformly recognized."

In Violett vs. Alexandria, 92 Va. 561, it was held that failure to provide for a notice to the person whose property may be affected by a local assessment, and to give opportunity for him to appear and contest the assessment at some stage of the proceedings, renders the statute authorizing such assessment void for want of due process of law. There ought, therefore, to be no room for argument that if (as the Missouri Su-

preme Court held), the organization proceedings are of such character that the land owner has no constitutional right of notice, then those organization proceedings have nothing whatever to do with the levy of any assessment against such owner's land, and, as already pointed out, the Missouri Supreme Court held in the Squaw Creek Drainage case, supra, that the Court only proceeds in a tentative and experimental way when it determines what lands should be included by reason of prospective benefits, and its decision on that point cannot constitute *res adjudicata*.

(2) The purpose of the Missouri drainage laws is manifestly of a public character, and for public benefit, and it must be conceded that the necessary result—indeed the avowed object of said Section 5538, considered in connection with the entire drainage law, is to take private property for public use. The Supreme Court of Missouri concedes that fact in its opinion in this case, but since the main point of reliance of plaintiffs in error in this Court hinges on this question of public use, it is important to observe the development of this idea of the public use contemplated by Missouri drainage laws. No sooner were drainage laws sought to be enforced in Missouri than their constitutionality was assailed on the ground that their enforcement took private property for private purposes, in violation of Section 20, Article 2, of the constitution of Missouri. Thereupon their constitutionality was upheld on the following theory: The Missouri Supreme Court conceded that it was true the state had no power to compel an owner to improve his land and that, if the only purpose of drainage was to improve the lands lying in the district, the law would be unconstitutional, but the Court held with firmness that the purpose was not PRIVATE, but was PUBLIC, being to improve the sanitation and promote the welfare of the State; that the real party pursuing the object was the State itself; that to accomplish the public purpose the State might rear any agency that it saw fit, and that such agency would be a public person acting for and in behalf of the state. Morrison vs. Morey, 146 Mo., l. c. 561-563; Mound City Land and Stock Co. vs. Miller, 170 Mo., l. c. 249-258.

It was then urged that if the purpose of drainage was a public one, it was clearly unconstitutional by reason of the manner in which the payment of the costs of drainage was exacted; that the collection of taxes wholly from the land in-

cluded within the district affected by drainage was in conflict with Section 3 of Article 10 of the Missouri constitution requiring all taxes for public purposes to be uniform; also in conflict with Section 4 of Article 10 of the Missouri constitution, requiring all property to be taxed in proportion to its value; also in conflict with Sections 11 and 12 or Article 2 of the Missouri constitution limiting the amount of aggregate rates of taxation; also in contravention of Sections 21 and 30 of Article 2 of the Missouri constitution providing against the taking of private property for public use without compensation, and without due process of law. Thereupon all of these objections were by the Missouri Supreme Court swept aside on the theory that said sections 3, 4, 11 and 12 were only applicable to taxation in its usual, ordinary and received sense, where the money raised went into the state, county or city treasury and became subject to any purpose for which the legislative body of such state, county or city might choose to apply it; that in that sense the collection of local assessments from land lying within the boundaries of a drainage district, for the purpose of paying the costs of the completed drainage, was no tax at all, but was merely an assessment of benefits actually rendered to the land; that in truth and fact no assessment at all was collected from the land itself; that prior to the collection of an assessment, the completion of the drainage system created benefits accruing to the land lying in such district, and that the assessment was collected from the benefits and not from the land; that nothing whatever was taken from an owner's original property, but he was only required to pay for benefits that had been actually conferred on him by the drainage district, and that in that manner the owners of land composing such district could be compelled to pay the entire cost of the drainage work, provided only that such costs did not exceed the aggregate amount of such benefits conferred. Egyptian Levee Co. vs. Hardin, 27 Mo., l. c. 496; Morrison vs. Morey, 146 Mo., l. c. 564; Mound City Land and Stock Co. vs. Miller, 170 Mo., l. c. 240.

Invariably have the drainage laws of Missouri been upheld on the principles above stated, which recognize that these drainage taxes constitute, in effect, a taking of private property for public use, and, as stated by this Court in the case of Chicago B. & Q. R. R. Co. vs. Illinois, 200 U. S. 561, whenever an expense is thrown by the public on one unlawfully, his property is taken for public use without due compensation.

There are probably no principles more firmly settled in the jurisprudence of this state than those. They have been applied not only in respect to drainage, but in respect to building levees. Egyptian Levee Co. vs. Hardin, Morrison vs. Morey, *supra*; constructing sewers, St. Louis vs. Oeters, 36 Mo., 456, Kansas City vs. Ridenour, 84 Mo., l. c. 258-259; paving streets, St. Joseph vs. Anthony, 30 Mo., 537; widening streets, St. Louis vs. Rankin, 96 Mo., 497; grading streets, Independence vs. Gates, 110 Mo., 374; and making parks, Kansas City vs. Ward, 134 Mo., 172.

(3) Since Section 5538 contemplates taking plaintiff's property for public use, it is quite clear from the foregoing cases that **plaintiffs are entitled to compensation in the way of benefits from the public work, for due process of law requires compensation for private property taken for public use.** In all of those cases, the special assessments have been upheld on the sole ground that the public improvement resulted in benefits to the property assessed and that those benefits constituted the "compensation" required by due process of law, and that payment of such compensation by "benefits" was no violation of the provision in both the Missouri and the federal constitutions, requiring due process of law in taking private property for public use. It must be conceded that this principle underlies all of the legislative acts of this character which have been pheld. This has been the attitude and position of the legislature in approaching this subject. The legislature had a right to exact special assessments because the purpose was public, and because the property assessed was especially benefited. Such a course has been by the courts invariably construed to constitute due process of law, and the absence of the principle of benefits has been construed by both the Missouri Supreme Court and by this Court to violate the due process of law required by both the Missouri constitution and the United States constitution, for due process of law includes the idea of a compensation to an owner whose property is charged for public use. Chicago etc. R. Co. vs. Chicago, 17 U. S. Sup. Ct., Rep. 581, l. c. 584, 166 U. S. 226, l. c. 241; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. l. c. 695, 17 U. S. Sup. Ct. Rep. l. c. 722; Norwood vs. Baker, 19 U. S. Sup. Ct. Rep. 187, 172 U. S. 269. These cases, as well as the Missouri cases which we shall now cite, all condemn an act of the legislature which precludes such BENE-

FITS—that is to say, COMPENSATION, for property taken for public use. In Corrigan vs. Gage, 68 Mo. 541, it was expressly held that the legislative power to exact special assessments is not unlimited. In that case, the Court said: "Those powers must be exercised within the bounds of reason and apparent necessity; they must not impose a burden without benefits." That case, in effect, declares void an assessment by the front foot rule to pay for a sidewalk built in an uninhabited outskirt of Kansas City, and the ordinance, though founded upon an implied legislative finding of benefits, was held to be unreasonable in that respect, and therefore to be void from absence of the benefit principle. This case has been since approved in Albright vs. Fisher, 164 Mo. l. c. 68 and in St. Louis vs. Theater Company, 202 Mo. l. c. 699. In Norwood vs. Baker, 172 U. S. 269, the United States Supreme Court declared invalid an exaction from the owner of private property of the cost of public improvements in excess of special benefits conferred, and held that to the extent of such excess, the ordinance attempted to authorize the taking of private property for public use without compensation, and therefore violated that provision of the federal constitution providing that no person shall be deprived of property without due process of law, since **due process of law includes the idea of compensation for property taken for public use.** Therefore, it seems quite clear that Section 5538 violates the constitutional provision for due process of law, because it permits the imposition of a special assessment without any inquiry into benefits. Of course, the legislature has just as much right to take the entire value of a tract for public use without compensation as it has to take a part of the value in that manner. This point can be illustrated by this very Section 5538, because the preliminary expenses of a drainage district may be sufficiently large to cause the tax per acre to equal or exceed the value of the land per acre in the case of land having a low valuation. The result is that **neither by virtue of the police power nor any other power residing** in the state, can any private property be taken for public use, without compensation. Chicago, B. & Q. R. Co. vs. Illinois, 200 U. S. 561.

(4) We have shown above that, by a proceeding *in invitum*, an owner may, by virtue of Section 5538, be deprived of his entire interest in his land for public use and WITHOUT COMPENSATION, in the case of a drainage scheme that

has been abandoned. **No compensation can result where the drainage work fails—that is to say, no compensation of the character contemplated by due process of low.** The only character of compensation ever claimed as possible to accrue in case of a drainage plan that has failed is that indicated by the following excerpt of the Missouri Supreme Court's decision, now under review:

> "In such cases it is evidently to the interest of all concerned that the facts should be ascertained at the earliest moment and with the least possible expenditure. In these respects the preliminary work was for the purpose of relieving those who should be found to receive the least benefit from the execution of the contemplated plan from an unjust burden, as well as to obtain such data, that the cost might be imposed upon those who ought in equity to bear it. Those relieved would in this way become, to that extent, the real beneficiaries." (Transcript p. 26.)

> "If at any time before the completion his work proves the enterprise to be impracticable, he has still accomplished in behalf of his land one of the things which he set out to do. He has demonstrated once for all either that the work is impracticable, or that the conditions are not yet ripe for its accomplishment. If this result cannot be said to be a benefit, then every man who expends time or money in tentative experiment upon his land is justified only if he succeeds and has done nothing useful if he has failed." (Transcript p. 28.)

It thus appears that the Missouri Supreme Court recognizes that the validity of this law can be upheld only on the principle of "benefits," and the only question remaining on this branch of the case is whether or not the knowledge that arises from this preliminary work constitutes the "COMPENSATION" required by due process of law in taking private property for public use. We deny that it constitutes such compensation.

The Missouri Supreme Court has heretofore uniformly ruled that the benefits for which an assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put. Killy vs. Cranor, 51 Mo.,

542, 14 Cyc. 1059. Special benefits are those which increase the value of the land, relieve it of a burden, or make it expressly adapted to a purpose which enhances its value. Lipes vs. Hand, 104 Ind., 503. It was on account of this principle that the Kansas City Court of Appeals of Missouri declared that it was beyond the power of legislative enactment to exact a special assessment against the abutting property of a citizen for the purpose of paying for sprinkling and that a special tax against abutting property is based and sustained on the idea that the work for which the tax is laid is an **improvement of the property,** and that sprinkling to keep down the dust, while good for the comfort of the inhabitants, is too intangible to be denominated a "benefit" to the property. Kansas City vs. O'Connor, 82 Mo. App., 655.

In Chicago vs. Blair, 149 Ills., l. c. 317, the court said:

> "Special assessments are necessarily based upon the idea of equivalent benefits, * * * * of such character as to enhance the market value of the property, * * * * it is common experience that well-paved streets and * * * * sidewalks furnish access to property and do, in fact, enhance its market value.
>
> It is, however, insisted that the sprinkling of streets renders the occupation of the adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points on the street to be filled every morning with fresh-cut uowers, or by open-air concerts in which music should be selected to the taste of the adjacent dwellers. So the employment of an efficient police force whereby greater safety was felt would add to the enjoyment and comfort of the persons residing upon that street. The proper watering and clipping of the grass along lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment * * * * of a locality. These all might be improvements, * * * * **but they are not improvements within the legislative contemplation when granting power to make local improvements by special assessments.**"

In the case of Ins. Co. vs. Prest, 71 Fed, Rep., 817, the U. S. Circuit Court of the Western District of Missouri quoted, in full, the above excerpt from the decision in Chicago vs. Blair, and followed that decision.

In the case of Pettit vs. Duke, 10 Utah, 311, the Supreme Court of Utah quoted the above excerpt from the case of Chicago vs. Blair, and, following that case, sustained an injunction against the collection of a special tax, because no benefit peculiar to the property and enhancing its value resulted from the improvement.

In the case of City of Owensboro vs. Sweeny, 111 S. W., 364, the Supreme Court of Kentucky also quoted from and followed the said case of Chicago vs. Blair, and held that wherever public improvements were not of such character as to create benefits of a physical and material character that enhanced the value of the property, any special assessment levied to pay for such improvements **constituted a taking of private property for public use without compensation.**

In Stevens vs. Port Huron, 149 Mich., 536, and in Kalamazoo vs. Crawford, 117 N. W., 572, the Supreme Court of Michigan held that a special assessment levied without regard to the principle of benefits was not due process of law, and deprived the citizens thus taxed of the equal protection of the law, secured to them by the 14th Amendment to the federal constitution.

In the Kalamazoo case, the court said that all courts agree that the benefit is the source of the power to levy a special assessment, and that whether or not the market value of the property is increased is the test of whether or not the property is benefited, and that the only difference that can be found in the various decisions of the courts is merely on the point as to whether or not such market value can be reasonably presumed to be enhanced.

In Washington Ice Co. vs. City of Chicago, 147 Ills., 327, the court said:

> "Private property cannot be damaged for public use without compensation, and while damages * * * * may be set off by special benefits accruing from the improvement, the benefits must be real and not chimerical. Otherwise, the constitutional safeguard is rendered of

no avail to protect the citizen in the enjoyment of his property, free from being damaged for public use without compensation."

But the most pronounced views on this subject, and directly contrary to those expressed in the opinion in the case at bar, are given by the Missouri Supreme Court in the comparatively late case of Kansas City vs. St. Louis & S. F. R. Co., 230 Mo., 369. That Court there declared invalid an assessment of benefits on the ground that there could be no possible benefit without the performance of certain other work, for which there were no definite plans then adopted, and that the uncertainty of benefits ever being derived was a sufficient ground to annul the assessment therefor. In the case of Hutt vs. Chicago, 132 Ill., 352, it was held to be improper to assess property along a proposed street, which is to be extended to a river, for benefits it may derive from the street with a bridge over the river, where the ordinance for the extension of the street made no provision for a bridge. So also, in the case of Washington Ice Co. vs. Chicago, 147 Ill. 327, it was held that there is no sufficient basis for taxation of benefits where the ordinance providing for the opening of a street across marshy land fails to state the nature and character of the improvement further than the mere opening of the street, and establishes no grade, nor adopts any plan for further improvement. Likewise in the case of Waukegan vs. Burnett, 234 Ill., 460, the Court said that where the property cannot be benefited by the proposed improvement, except subsequent work be done, for which no provision is made, such property cannot be specially assessed. To the same effect are the cases of Chicago vs. Kemp, 240 Ill. 56; Lindblad vs. Normal, 224 Ill. 362; Holdom vs. Chicago, 169 Ill. 109; State vs. Elizabeth, 40 N. J. L., 274; Guaranty & Title Co. vs. Chicago, 162 Ill., 505; Re Park Ave. Sewers, 169 Pa., 433; Edwards vs. Chicago, 140 Ill., 440.

It thus appears that in adjudging, in the case of Kansas City vs. R. Co., supra, that speculative benefits could not support a "special assessment," the Missouri Supreme Court placed itself in line with an unbroken chain of authorities from all jurisdictions wherein this point has been decided. Another case aptly illustrating the attitude of the courts on this point is that of City of Bridgeport vs. N. Y. & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63. There the city appraisers

were authorized to appraise benefits resulting to any person from the laying out of a new street, and it was sought to charge the defendant railroad company with an assessed benefit alleged to have resulted by reason of the new street enlarging the train operators' line of vision and thereby preventing future expenses of gates and flagmen. These benefits were held to be too remote, and no benefits whatever were allowed to be assessed, because the new highway, as such, could not possibly enhance the value of the company's easement over the land. In other words, the highway created no benefits attaching to the railroad company's property.

The foundation of the right to levy special assessments is the benefit which the PROPERTY ASSESSED is supposed to receive from the expenditure of the money. Wistar vs. Philadelphia, 80 Pa., 505; Re Market St., 49 Cal., 546. Special assessments can be constituionally imposed only for improvements clearly conferring special benefits upon the property assessed, and then only to the extent of those benefits, and it must be shown that the PROPERTY ASSESSED is what is benefited. Furthermore, the benefit must be peculiar to the property assessed. Hanscom vs. Omaha, 11 Neb., 37. To render such special assessments legal, not only must there be some special benefit, but it must appear that the benefit attaches to the property assessed and is direct and imment. Chamberlain vs. Cleveland, 34 Ohio St., 551; Hartford vs. West M. D., 45 Conn., 462.

In the Norwood case, *supra*, $2,000 damages had been paid Mrs. Baker for ground condemned for a street through her property, and then the city council had assessed said sum of $2,000, together with the $218 costs of the condemnation proceedings, back on her remaining property lying on either side of the street. This made the case worse than if Mrs. Baker had been required in the first instance to donate the land necessary for the street, for by the donation she would not have been charged with the $218 of condemnation costs. No legislative finding that her property was benefited IN EXCESS of the $2,000 damages awarded her could be permitted to stand, because it would, to the extent of such excess, constitute a clear taking of private property for public use without compensation. That was an attempt to take Mrs. Baker's property for public use, by means of the legislative body making a manifestly false finding of benefits. In declaring such finding

of benefits to be false on its face, and the entire assessment, therefore, to be unconstitutional and void the U. S. Supreme Court quoted from Cooley on Taxation (2nd Ed. C. 20), as follows:

> "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without comensation."

During the course of the opinion in the Norwood case, the Court further said:

> "The guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

Cases without number might be cited in support of the point now urged, namely, that the ignoring of this principle of benefits inevitably leads to a violation of the said provisions of both our state and federal constitutions, relative to due process of law, for due process of law includes the idea of compensation for private property taken for public use. We call attention to a few cases for purposes of illustration:

In Hammett vs. City of Philadelphia, 65 Pa. St. 146, the Court said:

> "Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

In Agens vs. Mayor, etc., 37 N. J. L., 416, the Court said:

> "If a statute should direct a certain street in a city to be paved and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If

this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary."

In Davidson vs. New Orleans, 96 U. S., 97, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th amendment; that it would be treated, not as an exertion of legislative power, but as a sentence, an act of spoliation. And in Loan Ass'n. vs. Topeka, 20 Wall., 655, the U. S. Supreme Court said:

> "No court would hesitate to adjudge void any statute declaring that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

The applicability of this illustration to a case involving a special assessment like the case at bar does, has been affirmed by the Missouri Supreme Court, itself, in McCormack vs. Patchin, 53 Mo. l. c. 36, where it said:

> "The whole theory of local taxation or assessment is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property of one individual to another. These are legal truisms, which have long been entertained and firmly established."

The foregoing excerpt was quoted at length in the decision of this Court in the Norwood case, *supra*. Being appropriate to the Norwood case, it is, therefore, appropriate to the case at bar.

If this principle should be yielded at all, then there remains no limit on the legislature, with respect to private property. In other words, if the benefit principle does not apply and consti-

tute a barrier between the legislature and the land proposed to be taken for public use, then there is no barrier at all protecting the owner of property from an enactment of the legislature, and the legislature can authorize a drainage district to levy a tax sufficient to pay all preliminary expenses, and those expenses may be so large as to cause the tax per acre to equal or exceed the value of the land per acre, especially in the case of land having a low valuation. Thus by a proceeding *in invitum* would an owner be deprived of his entire interest in his land taken for public use and without compensation, for the drainage scheme might then already have been abandoned and the purpose of the levy be merely to raise money to pay the expenses incurred prior to the abandonment of the scheme. To say that the abandoned scheme has resulted in benefit to the land is preposterous. It is contrary to all rational reasoning and to common sense. Herein does this case present identically the same issue as the Norwood case, supra, namely: Can a legisaltive finding thus palpably false be permitted to stand? Is it an act of taxation at all? Is it not rather an act of confiscation—a sentence—an act of spoliation? Will it be claimed that by reason of the preliminary plans and surveys, which reveal the impracticability and impossibility of the scheme, THE LAND was enhanced in value? Is not a legislative finding to that effect exactly on a par with the legislative finding that Mrs. Baker's remaining property had been benefited more than the value of the land taken, (Norwood vs. Baker, *supra*), and with the illustration of assessing the entire cost of street improvements on four particular houses (Agens vs. Mayor, 37 N. J. L., 416), and with the illustration relative to vesting arbitrarily the land of A in B (Loan Ass'n. vs. Topeka, U. S., 20 Wall., 655; Davidson vs. New Orleans, 96 U. S., 97; McCormack vs. Patchin, 53 Mo. 1. c. 36). Local assessments are justifiable on the single ground that the assessed land has been benefited. Norwood vs. Baker, *supra*, Eliminate the benefit, as is done in this case, and the tax in general. Norwood vs. Baker, *supra*.

Cooley, in his work on "Taxation," says:

> "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return

for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community **is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure** of public funds; and, in addition to the general levy, they demand that special contributions, **in consideration of the special benefit,** shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being **increased in value** by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. Cooley Taxn. 416, Chap. 20, Par. 1; Id. 2d Ed. 606, Par. 1."

Dillon in his work on "Municipal Corporations," says:

"Special benefits to the property assessed; that is, benefits received by it **in addition to those received by the community at large,** is the true **and only just foundation upon which local assessments can rest; and to the extent of special benefits** it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. 2 Dill. Mun. Corp., 4th Ed., p. 934, par. 761."

In the Norwood case, the Court said:

"**Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property,** such assessments, according to well established principles, resting upon the ground **that special burdens may be imposed for special or peculiar benefits accruing** from public improvements. Mobile County vs. Kimball, 102 U. S., 691, **703, 704, 26 L. Ed. 132, 136, 13 U. S. Sup. Ct. Rep., 293;** Bauman vs. Ross, 167 U. S., 548, 589, 42 L. Ed. 270, 288, 17 Sup. Ct. Rep. 966, and authorities there cited.

> **"But the power of the legislature in these matters is not unlimited.** There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement."

What we are contending for in this case is simply the general principle that in all special assessments, **the benefit that attaches to the land itself** in such manner as to enhance its value is the source of power to levy the assessment, and that is the basis of the decision in the Norwood case and in **Spenser vs. Merchant, 125 U. S. 345, on which we strongly rely, and which illustrates well our point that there must be a legislative finding of benefits and there must be some reasonable basis for such finding, in order for the law to be valid. In Spenser vs. Merchant, the public improvement had been made, the property itself had received the benefit of it, and had been enhanced in value, and the legislative finding to that effect was reasonable and just.**

The case of Barber Asphalt Pav. Co. vs. French, 158 Mo., 534, affirmed in 181 U. S. 324, is another case on which we rely. It affirmed the legality of a special assessment levied for a street improvement, **the actual construction** of which improvement furnished a firm basis for the legislative finding of "special benefits" to the abutting property. We recognize that it is impossible for any scheme of special assessment to do exact justice to all and that it is the misfortune of those few persons who, in a general scheme of special assessment for benefits, are found not to be benefited at all, as in the case of Heman vs. Schulte, 166 Mo., 409, and numerous other cases. **But it is sufficient if, in the main, the special assessment is founded on the principle of benefits, so that the very few who are not benefited are merely rare exceptions to the rule.** Quoting from Barber Asphalt Pav. Co. vs. French, 158 Mo. l. c. 561, the assessment must be upheld, as conclusive, "if the assessment be levied under a general or a comprehensive system for benefits, as was the case in Parson vs. Columbia, (170 U. S. 54), and which clearly exists under the charac-

ter and ordinance of Kansas City, **which provide a comprehensive system for the paving of all the streets of said city and an assessment per front foot upon all abutting property to pay therefor."**

Right here is where Section 5538 fails. **It carries its own mark of condemnation on its face,** in that it shows beyond a doubt that it absolutely disregards the principle of benefits and seeks to levy a tax to pay the cost not of an improvement, but of an abandoned and abortive drainage scheme. The injustice done by this assessment is not confined merely to exceptional cases, as was true of the assessment upheld in Heman vs. Schulte, 166 Mo., 409. The public burden is arbitrarily placed, as a new obligation, on a whole class of people—the nonsigners of the articles. They constitute the whole class against which the law is levied, just as Mrs. Baker, herself, constituted the whole class against which the assessment was directed in Norwood vs. Baker, and Gage constituted the whole class against which the assessment was directed in Corigan vs. Gage, 68 Mo., 541. We again insist that a legislative finding to the effect that an abandoned drainage scheme, or the expenditure of preliminary expenses incurred therein, can in any event, be of benefit to the land itself, on which a special assessment is placed for the purpose of paying those expenses, is a proposition contrary to rational reasoning and common sense; that a legislative finding of that character is false on its face; that the imposition of a tax based on such a finding is not an act of taxation; that it is nothing more than an act of confiscation; that it is as much an act of spoliation as an attempt of the legislature to declare arbitrarily that the homestead now owned by A should no longer be his, but should henceforth be the property of another.

The Missouri legislature, itself has now come to these same views, as is shown by its enactments and proceedings at its last session, as set forth in the statement of this brief. The intolerable injustice and oppressiveness of Section 5538 is something that the natural sense of justice of the human race will not long permit

SECOND SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that the enforcement of said Section 5538 will not result in taking plaintiff's property for public use without compensation, that is to say in violation of due process of law.

(1) The unconstitutionality of Section 5538 does not depend alone upon the fact that it provides for levying taxes in case of a drainage plan that has failed. Even if the plan should succeed, NO BENEFIT, but rather DAMAGE, instead, will result to the large part of plaintiffs' land that will be condemned and either taken in its entirety or else impressed with an easement for drainage purposes. The futility of the legislature undertaking to levy a benefit tax **on every acre of land within a district** immediately on the organization of the district, is self-evident when we consider other sections of the drainage law, ***in pari materia*** with Section 5538. For example, Section 5513 contemplates that the drainage improvements may consist not only of ditches, canals and levees, but may also consist of dams, reservoirs, holding basins and floodways, maintained on land within the district, and Section 5516 authorizes the commissioners, at the same time they go over the lands of the district assessing benefits, also to asses damages suffered by the landowners from the construction and maintenance of such reservoirs, holding basins, etc., on their lands within the district. The amended petition in this case (Transcript l. c. 13-14) alleges that a large portion of the lands of these plaintiffs was about to be condemned for such retaining basins, ets, and that the tax had been imposed under the authority of Section 5538 without any regard to the fact that plaintiffs were being taxed for benefits to lands that were being condemned and, therefore, conclusively presumed to be damaged, instead of benefited. While it was held in Heman vs. Schulte, 166 Mo., 409, (in which case the tax was assailed by a collateral attack, while the case at bar is a direct attack on Section 5538) that individual hardships will always be entailed in the working out of any general scheme of taxation, yet even the law of that case is not sufficient to uphold the constitutionality of Section 5538, for in the case of Heman vs. Schulte, as well as in the case of Barber Asphalt Paving Co. vs. French,158 Mo., 534, affirmed in 181 U. S., 324, the assessment was levied under a general and comprehensive scheme of benefits. There was nothing on the face of law and proceedings in those cases

indicating that a tax was authorized against various tracts receiving NO BENEFIT from the public improvement, much less did it appear that a tax was authorized against large areas that were being DAMAGED for public use, instead of being benefited. Section 5538 not only contemplates assessing the preliminary tax in case of an abandoned drainage plan, but, in connection with the other sections with which it is *in pari materia*, it contemplates, on its face, imposing a tax on large areas within the district which will be DAMAGED for public use; that is to say, upon large areas within the district which will be used for reservoirs, retaining basins, etc., and since the Missouri Supreme Court has held in the case of Squaw Creek Drainage District No. 1 vs. Turney, 235 Mo., 80, that the boundaries of the district prescribed by the judgment organizing the district, are subject to change, so that lands may be afterwards excluded therefrom, and others included therein, the futility of assessing the tax authorized by Section 5538 immediately after the organization of the district becomes still more apparent. It is evident from what we have said under this "Specification of Error" that Section 5538 does not contemplate the levying of a tax to pay for a broad and comprehensive scheme of benefits for the entire district. It contemplates, (a) a tax assessed on land not benefited at all in the case of an abandoned drainage district, and (b) a tax upon large areas that will be actually damaged for public use instead of being benefited by the success of the drainage plan. Either one of these results, manifestly contemplated by Section 5538, is fatal to its validity, because each one conflicts with the federal constitutional requirement of due process of law, which includes the idea of compensation for private property taken for public use.

Toward the large body of plaintiffs' land, embracing more than one thousand acres actually condemned for retaining basins and other drainage purposes, the Missouri Legislature assumed the following attitude when it enacted Section 5538: The Legislature contemplated that this large area would be condemned so as either to be taken in its entirety or else damaged by the district's easement for drainage purposes. It is plain that the Legislature contemplated this, because authority to that end is expressly given in Sections 5513 and 5516, as shown in the Statement, *supra*. The Legislature also contemplated, as held by the Missouri Supreme Court in the Squaw Creek Drainage case, *supra*, that large bodies of land

might first be tentatively included in the district and afterwards excluded, and that new territory might be added, so that the boundaries fixed by the organization proceedings would not be binding as *res adjudicata*, but would be merely experimental and tentative boundaries. In the face of these contemplated matters and contingencies, the Legislature of Missouri, nevertheless, said in Section 5538 that although large areas of land might be damaged instead of benefited, and although large areas of land might afterwards be excluded from the limits of the district, yet "As soon as any district shall have been organized, * * * * the Board of Supervisors shall have the power and authority to levy upon **each acre of land in the district, not to exceed 25 cents per acre, as a level rate, to be used for the purpose of paying the expenses of organization** * * * *."

Can it be said that the Legislature, in enacting such a law, was observing the principle of benefits, in accordance with the mandate of the federal constitution? And if it be said that this legislative edict is presumed to be supported by a finding of benefits to every acre in the district, must it be conceded that there is no relief from a finding of a fact **so manifestly false?** The Supreme Court of Nebraksa, in the case of Hanscom vs. Omaha, 11 Neb., 37, held that the legislative finding of benefits accruing to a large area of the city of Omaha by reason of the construction of a sewer was a finding that was a fraud, on its face, because that area was already perfectly drained and no benefits could possibly accrue thereto from the construction of the sewer, and the injustice of the assessment was manifested in the general scheme of assessment, just like Section 5538, construed with the other sections of the Missouri drainage law with which it is *in pari materia*, shows that the entire plan and scheme of the assessment of this flat tax contemplates, on its face, the levy of a special assessment on land that, instead of being benefited, **is actually damaged. The intolerable injustice of damaging large portions of plaintiffs' lands for drainage purposes, and at the same time assessing such lands to pay benefits is manifest.** The collection of such a tax ought to be enjoined by the court for the same constitutional reasons that the collection of the tax was enjoined in the case of Chamberlain vs. Cleveland, 34 Ohio St., 551, where the court held that the legislative finding of benefits, usually presumed to underlie a special assessment, if it existed at all in that case, **was false and should not be permitted to stand.**

The court in the Chamberlain case, *supra*, and in the case of Hartford, vs. West, M. D., 45 Conn., 462 held that no special assessment on land should exceed the direct, immediate and permanent benefits accruing to the land from the contemplated improvement. In the case of In Re Park Av., Sewers, 169 Pa., St., 433, the Supreme Court of Pennsylvania held that the limit of a special assessment must be the benefit received by the property assessed, and all the courts hold that whenever any legislative act is manifestly in disregard of this principle, the act cannot be deemed to be in harmony with the principle of due process of law.

THIRD SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that Sections 5538 is not retrospective so as to violate the due process of law requirement of Sec. 1, Amendment 14 of the Federal Constitution. Aside from all that we have so far said by way of questioning the right of the State ever to enact such a law as Section 5538, the following question now arises under the Third Specification of Error. Conceding for the sake of argument that the state has a right to exact such a tax as this from drainage districts formed after the enactment of the law, has not the state exceeded its power by undertaking to make this law operate retrospectively? It will not escape the attention of this Court that it was under Section 5496 that the Little River Drainage District was organized, and that, under the law and the proceedings had in the organization of that district, there was held out to the minority of land owners in the district that all the organization expenses were voluntarily assumed by the majority in interest, and would be paid by the majority, and by them alone, in case the drainage district plan should fail. The minority in interest, in a great many instances, stood by and permitted the drainage district to be organized without making objections thereto, because they believed they would be relieved of the paying of the organization expenses in case the scheme should fail. The minority in interest had a right to assume that the majority would fulfill the obligation they undertook when they signed the articles of incorporation. Then, as the amended petition in the case shows, very heavy preliminary expenses were incurred by the district, and those preliminary expenses, as the amended petition shows, even exceed the usual and customary organiza-

tion expenses by reason of the fact that the district undertook to reach out for new territory and to enlarge its boundaries, and to bring in such new territory without any obligation imposed by law on such new territory with regard to paying any of such preliminary expenses. With affairs in this shape, the legislature was procured to enact Section 5538, as the record in the case shows, and thereby cast upon the minority in interest the heavy burden of those preliminary expenses imposed on them **as a new obligation relating to transactions already past.** If this be not retrospective legislation, then it is difficult to understand what retrospective legislation is. It was a complete change of the method of payment of these organization expenses from that method which the majority in interest assumed as a solemn obligation over their own signatures. That obligation enured to the benefit of the minority in interest. That a legislative grant is a contract has been repeatedly ruled. Terrett vs. Taylor, 9 Cranch, l. c. 50; Pawlett vs. Clark, 9 Cranch, l. c. 332; Trustees Dartmouth College vs. Woodward, 4 Wheat, 656; Charles River Bridge vs. Warren Bridge, 11 Peters, 603; Walla Walla vs. Walla Walla Water Co., 172 U. S. 9. Section 5496 is a legislative grant of a charter and the Little River Drainage District was organized with Section 5496 as the principle features of its charter. The articles of association under that charter were required to be signed and were signed and filed. This created a contract, the obligation of which was for the benefit of the minority in interest. By the terms of that contract, the minority in interest were absolutely relieved from having to pay any of these preliminary expenses in case of the plan of drainage failing; as this plan of drainage ,in part, at least, did, for the record shows that it was necessary to take in new territory. The obligation of this contract being in favor of the minority in interest, they acquired a vested interest therein. How has that vested interest been affected by Section 5538? This is answered by the case of Bailey vs. R. Co., 4 Harr, (Del.) 389, 44 Am. Dec. 593, wherein it was held that the state cannot, by subsequent legislation, impose on a corporation an obligation to pay damages which cannot be enforced under the original grant, and wherein it was further held that an obligation of a contract is impaired by any deviation from its terms, either by imposing new conditions or dispensing with the performance of conditions, however minute or apparently immaterial those conditions may be.

The common law of the State of Missouri, as well as the various sections of the drainage law, all formed a part of the charter of the Little River Drainage District. Edwards vs. Kearzy, 96 U. S., 595; Muhlker vs. N. Y. & H. R. Co., 197 U. S., 544. Therefore, the charter of the Little River Drainage District distinctly provided, as heretofore shown by the decisions of the State of Missouri and by the various sections of the drainage law itself, that no special assessment could be levied on plaintiffs' lands except on the principle of benefits, and that any expenses incurred otherwise must be paid by the majority in interest, who assumed that obligation over their signatures. Every landowner in the district was a member of this drainage corporation, and entitled to all the benefits of its charter, and to the protection afforded him by that charter. Every landowner in the district, instead of putting money into the corporation, either directly by his own act, or indirectly through the action of the court, put in his land, and thereby became entitled to membership. But the vested rights, arising under the laws of the State of Missouri, which formed a part of the charter of that corporation, and particularly the vested rights arising from the solemn obligation assumed by the majority in interest over their own signatures, were absolutely destroyed by Section 5538.

> "A grant, in its own nature, amounts to an extinguishing of the right of the grantor and implies a contract not to re-assert the right." Fletcher vs. Peck, 6 Cranch, 87.

When the State descends from the plane of its sovereignty and contracts with private persons it is regarded *pro hac vice* as a private person itself, and is bound accordingly. Davis vs. Gray, 16 Wall., 203.

In the case of Fisk vs. Police Jury of Jefferson, etc., 116 U. S., 131, the court said:

> "This contract is a completed contract. Its obligation is perfect and rests upon the remedies which the law then gives for its enforcement. The *vice* of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, * * * * and in rejecting that

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> **much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request or for the use of another, the law completes the contract by implying an obligation,** on the part of the latter to make compensation. This law can no more be impaired by a law of the state than that arising on a promissory note."

Also in the case of State of Louisiana vs. Police Jury of the Parish of St. Martin, 111 U. S., 716, the inquiry disclosed the fact that one Nelson procured a judgment upon treasury warrants issued by the Parish of St. Martin, in favor of the municipal authorities of New Iberia, for $4500.00 for the building of a bridge over Bayou Teche and payable by special appropriations out of moneys from certain taxes that were afterwards abolished. He applied for mandamus, and the court decided that where a contract is made upon the faith that **taxes will be levied,** legislation repealing or modifying the taxing power of the corporation so as to deprive the holder of the contract of his remedy is unconstitutional, because impairing the obligation of a contract. The converse of that case would be the case at bar, viz., that where a contract is made upon the faith that **no taxes will be levied,** legislation repealing or modifying the taxing power of the corporation so that **taxes may be levied,** is also unconstitutional. See also Hall vs. Wisconsin, 103 U. S., 5; Gordon vs. App. Tax Court, 3 Howard, 343.

Following the reasoning of City of St. Louis to use v. Clemens, 52 Mo. l. c. 14, (a case in principle identical with the case at bar), we see that before the passage of section 5538, the Drainage District could collect this tax from such minority, only by conforming to the benefit principle laid down in the charter (i. e., the drainage act) as it then existed. Such minority members were absolutely free from liability for any preliminary expense of a drainage scheme that had failed and been abandoned. That liability rested upon the signers of the articles and upon them, alone. It constituted the obligation of a contract. The non-signers, including these plaintiffs, were the beneficiaries of that contract and the owners of a vested interest therein. But the passage of Section 5538 changed the obligation of that contract,—shifted the liability from the signers to the non-signers, and after the passage of the law, the district could collect this special assessment from the non-signers, regardless of the benefit principle. Section 5538, it-

self, created the new obligation, where no obligation existed before, and in so doing operated retrospectively and impaired the obligation of the contract embodied in the articles of association signed by the majority in interest. State ex rel Haeussler vs. Greer, 78 Mo., 188; Fisher vs. Patton, 134 Mo 53; City of St. Louis to use vs. Clemens, *supra*; In re Pell, 171 N. Y. 48; State ex rel Pittman et al vs. Adams et al, 44 Mo. 570; Dartmouth College vs. Woodward, 4 Wheaton 518; State ex rel vs. Haben, 22 Wis. 660.

It is not necessary for the federal constitution to have a direct prohibition against retrospective laws, for retrospective laws are construed by the courts of every civilized jurisdiction as violating the fundamental principles of due process of law, and if we are able to show that Section 5538 operates retrospectively, we thereby show that it is in conflict with Section I of Amendment 14 of the federal constitution requiring due process of law. The amended petition (Transcript pp. 11, 16), which is taken as confessed by the demurrer and stipulation, shows on its face that the Little River Drainage District was incorporated on the basis of laws in existence on November 30th, 1907, when the judgment of incorporation was rendered, and that Section 5538 is a modification of the drainage law that was in existence in 1907, and that Section 5538 did not become a law until its approval on June 1st, 1909. Prior to June 1st, 1909, there was no provision for making any one other than the petitioners for a drainage district liable for any preliminary expenses in the case of a drainage scheme that had been abandoned, or that had failed, or had been found impractical. This burden was not imposed on the non-signers of the petition until after the drainage district had been incorporated by said judgment of Nov. 30th, 1907. By its very terms, Section 5538 is retrospective. It has been universally construed to apply, and does by its terms apply, to drainage districts formed prior to its passage just as much as to those organized after its passage. The following portion of Section 5538 shows that it is intended to be retrospective. It recites:

> "Any district which may have proceeded without such levy may * * * make such level assessment * * * and if such items of expense have already been paid * * * the surplus shall be paid into the general fund of the district."

There can be no doubt that this law is intended to operate retrospectively, and retrospective laws are obnoxious to the federal constitutional requirement **of due process of law.** In Leete vs. State Bank, 115 Mo. l. c. 200-201, the Missouri Supreme Court said:

> "The State of New York has no prohibition against retrospective laws, but nevertheless, in Westervelt v. Gregg, 12 N. Y. 202, the act of 1848 substantially identical with our own statute was passed upon, and it was there held that the act of 1848 was unconstitutional because of violating that organic procision which declares that **no person shall be deprived of life, liberty or property without due process of law.** This is a leading case, the ruling being unanimous, and made at a period when such jurists as Judge Denio adorned the bench, he delivering one of the opinions. The same ruling has been repeatedly made in that State (Norris v. Beyea, 13 N. Y. 273; Holmes v. Holmes, 4 Barb. 295; Ryder v. Hulse, 24 N. Y. 372), and the same view has been taken elsewhere. Sperry v. Haslam, 57 Ga. 412; Dunn v. Sargent, 101 Mass. 366."

FOURTH SPECIFICATION OF ERROR.

The Missouri Supreme Court erred in adjudging that said Section 5538 does not violate Section 10, Article 1, of the Federal Constitution prohibiting a state from passing any law impairing the obligation of contracts. Under this Specification of Error, just as under the Third Specification of Error, we may concede, for the sake of argument, that the state, in the first instance, might have a right to enact such a law as Section 5538, making the same applicable only to drainage districts organized after its passage. Section 5538, however, as pointed out under the Third Specification of Error, applies to drainage districts formed prior to its passage as well as to those formed after its passage, and for the same reasons, and under the same authorities cited under the Third Specification of Error, Section 5538 violates Section 10, Article 1 of the Federal Constitution prohibiting laws impairing the obligation of contracts. Having shown under the Third Specification of Error that Section 5538 operates retrospectively, and having shown that plaintiffs' vested interest affected by Section 5538 is the obligation of a contract, we have established the proposition that

Section 5538 violates Section 10, Article 1 of the Federal Constitution, protecting the obligation of contracts from impairment by state legislation. But it has been said that this proposition does not come within the terms of the stipulation on which this case was tried. In the first place, as indicated under the Third Specification of Error, precisely this identical point is preserved under the "due process of law" branch of the case, which has already been thoroughly discussed. We deem it not inappropriate, however, to suggest that the point on the constitutional prohibition against laws impairing the obligation of contracts is also saved and presented for consideration under Section 10, Article 1 of the Federal Constitution, because that point was necessarily involved in the judgment rendered by both the Circuit and the Supreme Court of Missouri. The demurrer confessed the allegations of the amended petition, which allegations state facts showing the retrospective features of Section 5538, and also state facts showing that there was an impairment of the obligation of the contract embodied in said Section 5496, under which section the incorporation proceedings were instituted. The allegations of the amended petition state facts showing the organization of the district step by step. The law under which the district was incorporated was said Section 5496, the charter of the district. Then the amended petition alleges that Section 5538 was enacted after the organization had taken place and all expenses incident thereto had been incurred. It was in the light of this amended petition and demurrer that the stipulation was drawn.

The amended petition shows that this case is brought upon but one theory and is founded on but one ground, viz., that Section 5538, R. S. of Mo., is void under both the constitution of Missouri and the constitution of the United States. Under no circumstances could judgment have been entered herein without affirming or denying this theory. Furthermore, the case was presented on a stipulation raising the single question of the validity of this law under both constitutions. (Transcript p. 16.) In State ex rel. Mulholland vs. Smith, 141 Mo. 1, the Missouri Supreme Court said:

> "Persons who put cases into shape for judgment on agreed facts, are assumed to do so with the knowledge that any law justly applicable to those facts may be resorted to by either party, and that the right to claim

> the benefit of any law that fits the agreed facts exists on appeal as well as in the court of first instance * * * When the judgment of a court on agreed facts obviously and necessarily comprehends a decision on a question of constitutional right, that question is "involved" in the judgment. Kaukauna Co. vs. Green Bay, etc., Co., 142 U. S. 254."

In Kaukauna Co. vs. Green Bay, etc., Co., 142 U. S. 254, this Court said:

> "Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question was necessarily involved in the disposition of the case by the State court. (Wilson v. Black Bird Creek Marsh Co., 27 U. S. (2 Pet.) 245; Armstrong v. Athens County, 41 U. S. (16 Pet.) 281; Chicago L. Ins. Co. v. Needles, 113 U. S. 574; Eureka Lake and Y. Canal Co. v. Yuba County Super. Ct., 116 U. S. 410.)"

Wherever either the plaintiffs' cause of action or the defendant's defense is founded upon the validity or invalidity of a statute, the constitutionality and life of that statute are involved from the start to the finish, because the question as to whether or not the statute has any legal force and effect, determines whether there is any cause of action, or any valid defense, and it has been uniformly ruled by the courts of prac-

tically every jurisdiction that the vitality of a cause of action may be raised at any time, and in any court until the final end of the case. McGrew vs. Mo. Pac. Ry., 230 Mo. 496; Ex Parte Siebold, 100 U. S., 371.

For the reasons stated in this brief the decision of the Honorable Supreme Court of Missouri, in the case at bar, should be reversed, Section 5538 should be declared unconstitutional and void and plaintiffs in error should be granted the injunctive relief prayed for in their amended petition.

Respectfully submitted,
THOMAS D. HINES,
DAVIS & HARDESTY, and
GIBONEY HOUCK,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

LOUIS ROUQUE and MARY E. ROUQUE, his wife, [illegible] J. AUBEL and E. A. [illegible],

Plaintiffs in Error,

vs.

THE LITTLE RIVER DRAIN AGE DISTRICT, JOHN H. [illegible], [illegible], ET AL.,

Defendants in Error.

STATEMENT AND BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

[illegible]

[illegible]

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 308.

LOUIS HOUCK and MARY H. G. HOUCK, His Wife; CHARLES J. JUDEN and C. G. COX, **Plaintiffs in Error,**	
vs.	**No. 308.**
THE LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, ET AL., **Defendants in Error.**	

STATEMENT IN BEHALF OF DEFENDANTS IN ERROR.

This case comes here by writ of error from the Supreme Court of Missouri.

The plaintiffs in error are the owners of several thousand acres of land situate in Cape Girardeau County, Missouri, within the limits of The Little River Drainage District.

The defendants in error are The Little River Drainage District, its managing Board, designated by the statute of Missouri as "Board of Supervisors", the President and Secretary of the Board of Supervisors, the County Clerk and the Collector of the Revenue of Cape Girardeau County, Missouri.

The Little River Drainage District is a public corporation of the State of Missouri, quasi municipal in its characteristics. It embraces an area of approximately five hundred thousand acres of contiguous, wet, swampy and overflowed lands, lying within the Counties of Bollinger, Cape Girardeau, Scott, Stoddard, New Madrid, Dunklin and Pemiscot, in the southeastern portion of Missouri. The district extends from the foothills of the Ozark Mountains in Bollinger and Cape Girardeau Counties on the north to the Arkansas state line on the south, a distance of about ninety miles. Its average width is about ten miles. The district has a larger acreage of land within its boundaries than has the State of Delaware.

The streams of Castor River, Whitewater River, Crooked Creek, Hubble Creek and other hill streams discharge their waters into the district near its northern boundary. The land has a uniform fall to the south of about one foot to the mile, but, owing to its low elevation and the insufficient channels of the streams in the low lands, the waters soon spread over the entire surface of the land, rendering it an unsanitary timbered swamp, unfit for profitable agricultural purposes and a menace to the public welfare of the State.

These lands are a part of the swamp, wet and overflowed lands granted by the United States to the State of Missouri under an Act of Congress approved September 28th, 1850 (The Little River Drainage District vs. Railroad, 236 Mo. 97, l. c. 111).

In 1906 proceedings were instituted in one of the state courts of Missouri, under the provisions of the statute of that State (Article III, Chapter 122, of the Revised Statutes of Missouri, 1899, as amended by the General Assembly of Missouri in 1905 and 1909), for

the purpose of incorporating all of said lands, including the lands of plaintiffs in error, into a drainage district. Such proceedings were subsequently had in the state courts as culminated, on the 30th day of November, 1907, in a decree incorporating all of said lands, including the lands of the plaintiffs in error, as The Little River Drainage District, a public corporation of the State of Missouri. (Transcript p. 12.)

No question is raised by plaintiffs in error as to the regularity of any of the proceedings had in connection with the organization of the drainage district, or any of the acts of the Board of Supervisors of the district, except that they complain of and seek to enjoin by this suit an assessment levied by the Board of Supervisors on all the lands in the district, under the provision of Section 8263U of an act amending Article III, Chapter 122, Revised Statutes of Missouri, 1899 (Laws 1909 p. 625), and now Section 5538, Revised Statutes of Missouri, 1909, and which section is as follows:

> "Section 8263U. **Levy of 25 Cents Per Acre May Be Made for Preliminary Work.** As soon as any drainage district shall have been organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power and authority to levy upon each acre of land in the district, not to exceed twenty-five cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the

> opinion of its board of supervisors it be desirable to do so, make such level assessment for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work proposed may have failed or have been found impractical."

On the 21st day of March, 1910, the Board of Supervisors of The Little River Drainage District, under and in pursuance of the power and authority given them in Section 5538 above quoted, levied an assessment of twenty-five cents per acre upon each and every acre of land within the district, including the lands of the plaintiffs in error, for the purpose of paying the expenses of organizing said drainage district and for making the topographical and other surveys for the Plan for Drainage, and for making the assessment of benefits and damages to the lands in said district, before entering upon the main work of reclaiming the lands in said district. This levy was made in strict compliance with the provisions of said Section 5538 of the Revised Statutes of Missouri, 1909, above quoted.

The plaintiffs in error resisted the payment of this preliminary or organization assessment, so far as it affected their lands in the district, and thereupon brought their bill in equity (transcript p. 11), by and in which they sought to enjoin (without giving a bond) the defendants in error from collecting this acreage assessment of twenty-five cents per acre.

In their bill the plaintiffs in error aver and charge that Section 5538 of the Revised Statutes of Missouri, 1909, is unconstitutional and void, being in contravention of the following sections of the Constitution of the State of Missouri, to wit:

(1) "That it is in contravention of Section 3 of Article 10, requiring all taxes to be for public purposes and to be uniform;

(2) "Section 4 of Article 10, requiring all property to be taxed in proportion to its value;

(3) "Section 21 of Article 2, forbidding the taking of private property for public use without just compensation;

(4) "Sections 11 and 12 of Article 10, limiting the amount of the aggregate rates of taxation; also

(5) "Section 30 of Article 2, providing that no person shall be deprived of property without due process of law; and also

(6) "In contravention of the 14th Amendment of the Constitution of the United States, providing that no citizen of the United States shall be deprived of his property without due process of law."

(Transcript p. 15.)

The defendants in error filed in the trial court a general demurrer to the plaintiff's bill and thereby raised the issue directly as to whether or not said Section 5538 of the Revised Statutes of Missouri, 1909, was in contravention of either of the enumerated provisions of the Constitution of the State of Missouri, or of the 14th Amendment to the Constitution of the United States, so complained of in their bill. (Trans. p. 16.)

In order to eliminate the consideration of every other averment in plaintiffs' bill, except to determine the constitutionality of said Section 5538 by the enumerated provisions of the Constitution, set out in their amended bill, both sides entered into the following stipulation hereinbelow set out, at the time the demurrer was submitted to the court, to wit:

"It is admitted that the **only question in controversy in this cause** is as to the constitutionality of Section 5538 of the R. S. of Mo. 1909.

"**If the Court should find on demurrer to plaintiffs' petition** that Section 5538 is a valid and legal section under the Constitution of Missouri and of the U. S., the demurrer should be sustained and plaintiffs' bill dismissed.

"If, on the other hand, the Court shall find said section violates either the Constitution of Missouri or of the United States, then said demurrer should be overruled and judgment entered accordingly. Each party reserves the right to appeal from the judgment of the said Circuit Court."

The State Circuit Court of Cape Girardeau County, Missouri, on the 22nd day of January, 1911, sustained the demurrer and thereby held that said Section 5538 was not in contravention of either of the provisions of the State Constitution, nor was it in contravention of the 14th Amendment to the Constitution of the United States, and entered judgment accordingly.

The plaintiffs in error then prosecuted an appeal to the Supreme Court of Missouri. The cause was of so much importance to the public that the Supreme Court of that State, upon motion, advanced the hearing of it on its docket. (Transcript p. 8.)

The case was first heard in Division No. 1 of the Supreme Court of Missouri, and the judgment of the trial court, sustaining the demurrer to the plaintiffs' bill, was by the unanimous vote of all the justices of that division affirmed, thereby holding that Section 5538 was not in conflict with the enumerated provisions of either of the constitutions named. (Transcript pp. 22-29.)

Within ten days after the rendition of the final judgment and the filing of the opinion in Division No. 1 of said court, the plaintiffs filed their motion to transfer the cause to the court en banc. Section 4 of Article 6 of the Constitution of Missouri makes it the duty of either division of the Supreme Court to send a cause to court en banc whenever the record of the cause affirmatively shows that a Federal question was raised in the pleadings. Plaintiffs' bill averring (transcript p. 15) that said Section 5538 of the Revised Statutes of Missouri, 1909, was in contravention of the 14th Amendment to the Federal Constitution, in that no citizen shall be deprived of his property without due process of law, a Federal question was raised, and the case was therefore transferred to the Supreme Court of Missouri en banc.

The Supreme Court en banc, after a re-argument of the case and a full consideration of every question raised in the record before it, adopted the opinion written by Commissioner Brown of Division No. 1 as the opinion of the court en banc (transcript p. 33), and again affirmed the judgment of the trial court in holding that Section 5538 was not in contravention of the enumerated provisions of either the State or Federal Constitution.

An examination of the opinion (transcript pp. 22-29) of the Supreme Court of Missouri will show that that court decided every question raised by the plaintiffs in error in their amended bill against them, and affirmatively declared that Section 5538 was not in contravention of the enumerated provisions of either the Constitution of the State of Missouri or of the Constitution of the United States.

From that final judgment plaintiffs in the suit bring the case here on writ of error.

Plaintiffs' bill discloses, as shown by the record (transcript p. 15), the raising of but **one Federal question for this court to determine,** and that is as to whether or not the enactment of Section 5538 of the Revised Statutes of Missouri, 1909, is in violation of that clause of the 14th Amendment to the Federal Constitution providing "that no citizen of the United States shall be deprived of his property without due process of law". If this section of the Missouri statute is in violation of that clause of the 14th Amendment to the Federal Constitution, this case ought to be reversed; but if said statute is not in contravention of said clause, then the judgment of the Supreme Court of Missouri ought to be affirmed.

In this court plaintiffs in error have abandoned all the causes set out in their amended bill, challenging the constitutionality of Section 5538 of the Revised Statutes of Missouri, except that said Section 5538 is unconstitutional and void, for the reason that it is in contravention of that clause of the 14th Amendment to the Constitution of the United States **"providing that no citizen of the United States shall be deprived of his propery without due process of law".** (Transcript p. 15.) This is the **only averment in plaintiffs' bill that makes any reference whatever to the Federal Constitution, and consequently is the only averment that raises a Federal question.**

Plaintiffs in error have, in this court, attempted to enlarge the issues by setting out in their assignment of errors, Nos. 1, 3 and 4 (transcript pp. 39-40), grounds or allegations **not made in their amended bill and not considered by the trial court, nor by the Supreme Court of Missouri.** They now and in this court, in their assignment of errors, say that Section 5538 of the Revised Statutes of Missouri, 1909, is in contravention of

(a) Section 10 of Art. 1 of the Constitution of the U. S., prohibiting any State from passing any law impairing the obligation of contracts. (Plfs. brief p. 16, transcript p. 39.)

(b) Section 1, Art. 14, of the Amendments to the Constitution of the U. S. prohibiting any State from making or enforcing any law abridging the privileges and immunities of citizens of the U. S., and prohibiting any State from denying to any person within its jurisdiction the equal protection of the laws. (Plfs. brief p. 17, transcript pp. 39-40.)

(c) Art. 5 of the Amendments to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without compensation. (Plfs. brief p. 17, transcript pp. 39-40.)

No complaint was made in plaintiffs' amended bill that Section 5538 of the Revised Statutes of Missouri, 1909, was in contravention of Section 10 of Art. 1 of the Constitution of the United States (transcript p. 15). Nevertheless, plaintiffs in error have here attempted to enlarge the averments in their bill so as to secure the consideration of this question—a question not presented to the trial court nor considered by the Supreme Court of Missouri. (Assignment of Error No. 1 Plfs. brief p. 17.)

No complaint was made by plaintiffs in error in their amended bill that Section 5538 of the Revised Statutes of Missouri, 1909, was in violation of Art. 5 of the Amendments of the Constitution of the United States. (Transcript p. 15.) Nevertheless, plaintiffs have here attempted to enlarge the averments in their amended bill and to secure the consideration of this

question—a question not presented to the trial court nor considered by the Supreme Court of Missouri. (Assignment of Error No. 4 Plfs. brief p. 17.)

No complaint was made by the plaintiffs in error in their amended bill that Section 5538 was in contravention of those clauses of Section 1 of Art. 14 of the Amendments to the Federal Constitution prohibiting any State from making or enforcing any law abridging the privileges or immunities of citizens of the United States, and prohibiting any State from denying to any person within the jurisdiction the equal protection of the laws. (Transcript p. 15.) Nevertheless, plaintiffs have here attempted to enlarge the averments in their amended bill and to secure the consideration of this question—a question not presented to the trial court nor considered by the Supreme Court of Missouri. (Assignment of Error No. 3 Plfs. brief p. 17, transcript pp. 39-40.)

None of these three last-named assignments was presented to the trial court for consideration. They are not "specified or set up" in their amended bill. Counsel for plaintiffs in error attempted to present them in brief and argument to the Supreme Court of Missouri, but the court declined to consider them. Hence we maintain such questions are not before this court.

Counsel for plaintiffs in error have set out in their brief incomplete quotations from various sections of the Missouri statute, appearing in Article 1, Chapter 41, R. S. Mo. 1909, but we deem some of the omissions very material in determining this case, and hence shall quote more at length from the statute. But before setting out the sections of the statute in full, we shall briefly state the various steps in the procedure provided for by the statute in organizing drainage districts,

such as the defendant in error, it being organized under what is locally known as the "circuit court law", Article 1, Chapter 41, R. S. Mo. 1909, as distinguished from the "county court law", Article IV, Chapter 41, R. S. Mo. 1909.

The Articles of Association of The Little River Drainage District were filed in September, 1905, in accordance with the provisions of the amendments adopted by the 43rd General Assembly of Missouri, amending Article III of Chapter 122, R. S. Mo. 1899, found in Laws of Missouri, 1905, page 190 et sec. These and subsequent amendments appear in the revision of the Missouri statutes of 1909 as Article 1 of Chapter 41, beginning with Section 5496.

The statute provides that a majority in interest of the owners of any contiguous body of swamp or overflowed lands in this State may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign Articles of Association, in which shall be stated: the name of the district and the number of years the same is to continue; the limits of the proposed drainage district, which shall in no event embrace an area of less than six hundred and forty acres; the **names and place of residence of the owners of land in said district, together with a description of the land owned by each**, and such owners of real estate as are unknown may be set out in such Articles as such; and said Articles shall further state that the owners of real estate within said district whose names are subscribed to said Articles are willing to and do obligate themselves to pay the tax or taxes which may be assessed against their respective lands to pay the expenses of organization and of making the improvements that may be necessary to

effect the drainage of said lands so formed into a district, and to reclaim and protect said lands from the effects of water; and after said Articles of Association shall be signed, the same shall be filed in the office of the clerk of the circuit court of the county in which such drainage district is located, or, if such drainage district is composed of tracts or parcels of land situated in two or more counties, then in the office of the clerk of the circuit court of the county in which there are situated more of the lands of said district than in any other county in said district, praying that they may be declared a drainage district under this Article.

Section 8251 Laws of Missouri 1905, p. 190.
Section 5496 R. S. Mo. 1909.

The next section provides that upon the filing of the petition or "Articles of Association" in the office of the clerk of the proper circuit court it is made the duty of the clerk of that court to:

> "**Issue a summons, as now provided by law, directed to the several owners of real estate in said proposed district** who have not signed said Articles of Association, or who may not have entered their appearance, in said circuit court, **which shall be served as summons in civil cases**; and in case any owner or owners of real estate in said proposed district are unknown or cannot be found, or are non-residents, they shall be notified in the same manner as non-resident defendants are now by law notified, setting forth in said notice that the Articles of Association, as aforesaid, have been filed, and the purpose thereof, and that the real estate of such non-resident owner or owners situated in said district, fully describing the same, will be affected thereby **and rendered liable to taxation for the purpose**

of paying the expenses of organization and making the improvements that may be necessary to effect the drainage of the lands included in said district; and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same. * * * *"

Section 8252, Laws of Missouri, 1905, p. 190.
Section 5497, R. S. Mo. 1909.

It will thus be noted in passing that the plaintiffs in error, who were objectors and not petitioners, were notified at the very inception of this proceeding that their several tracts of land would be affected by the organization of the district, "**and rendered liable to taxation for the purpose of paying the expenses of organization** and making the improvements that may be necessary to effect the drainage of the lands included in said district".

The next section provides that any land owner who has not signed the Articles of Association may file objections to the organization and incorporation of the drainage district on or before the first day of the term to which he was summoned to appear, and show cause, if any he have:

"why such drainage district should not be organized and incorporated, or why his land, or any part thereof, will not be benefited by the proposed drainage or should not be embraced in said drainage district and made liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case all such objections are overruled, the circuit court shall by its order, duly entered on record, duly declare and decree said drainage dis-

trict a public corporation of this State, for a term not exceeding the time mentioned in the said Articles of Association, signed and filed. **In case any land owner of real estate, included in said district, shall satisfy the court that his real estate, or any part thereof, has been wrongfully included therein, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare and decree the remainder a drainage district as prayed.** * * * *"

Section 8253, Laws of Missouri, 1905, p. 192.
Section 5499, R. S. Mo. 1909.

The next section provides that within fifteen days after the court shall have rendered judgment incorporating the district the clerk of the circuit court shall call a meeting of the land owners of the district for the purpose of electing a Board of Supervisers, and at such meeting each acre of land shall represent one share, and each land owner shall be entitled to cast as many votes as he has acres. Five men are elected as the managing board of the district. Lots are cast to determine their term of service, which is respectively one, two, three, four and five years.

Section 8255, R. S. Mo. 1899;
Section 5507, R. S. Mo. 1909.

Annually thereafter, upon notice duly published, a meeting of the land owners is held, and in like manner a land owner is elected who takes the place of the supervisor whose term has expired.

Section 8256, R. S. Mo. 1899;
Section 5508, R. S. Mo. 1909.

The statute then provides for the organization of the board, its duties, and the record that shall be kept of its proceedings.

Section 8258, R. S. Mo. 1899;
Section 5510, R. S. Mo. 1909.

After organizing, the Board of Supervisors is required to employ a chief engineer, whose duty is to "make a complete topographical survey of the said district and submit the same to the Board of Supervisors with maps and profiles of said survey, and a full and complete plan for draining and reclaiming the lands in the district * * * *."

Section 8259, Laws of Missouri, 1905, p. 194.
Section 5511, R. S. Mo. 1909.

It will be noted that up to this point no method of obtaining money has been provided for the payment of expenses incurred in the organization of the district, nor to carry on the engineering work required by the preceding section; hence the section in controversy (Section 5538) was enacted to meet the emergencies of the drainage districts of the State which were without funds to carry on their preliminary work.

This section (Section 5538) provides that the Board of Supervisors may levy an assessment not to exceed twenty-five cents per acre on all the lands in the district "as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plan of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary before entering upon the main work of drainage"; that is to say, such an assessment may be levied on all the lands which the court found "would be benefited by the proposed drainage", and should be "embraced in the said drainage district and made liable to taxation for draining the same".

The court found the lands of plaintiffs in error fell within this class, and included them in the district. The Board of Supervisors levied an assessment of

twenty-five cents per acre under this section, and it is the collection of this assessment that plaintiffs in error seek to enjoin.

Section 8263U, Laws of Mo., 1909, p. 629;
Now Section 5538, R. S. Mo. 1909.

The engineers employed by the district are required to report to the Board of Supervisors when requested, and upon the receipt of the final report of the engineers the Board of Supervisors may consult with and take the advice of eminent engineers concerning said report, and after consultation may adopt the report as presented, or a modification thereof, and said report then becomes the "Plan for Drainage" or general specifications of the construction work undertaken by the district. It is the foundation on which the benefit assessments are based.

Section 8259a, Laws of Missouri, 1905, p. 194.
Section 5512, R. S. Mo. 1909.

A certified copy of the "Plan for Drainage", as adopted by the Board of Supervisors, is then required to be filed by the Secretary of the Board with the clerk of the court incorporating the district, and at the same time the Board of Supervisors is required to file and present a petition to the judge of said court, praying for the appointment of three commissioners to assess the benefits and damages that will accrue to the lands within the district by reason of the construction of the works and improvements provided for in the "Plan for Drainage".

Section 8260 Laws of Missouri 1905, p. 196;
Section 5514 R. S. Mo. 1909.

The duties of the commissioners so appointed by the court, and rules for determining of the amount of the benefits and damages to the various kinds of prop-

erty in the district, and the form in which they shall make their report, is all prescribed by statute. The money required to make the permanent improvements in the district is raised by assessments upon the lands benefited—the principle being that benefits shall be assessed in proportion to the actual betterments that will be received by the different tracts of land by reason of the construction of the drainage works and improvements provided for in the "Plan for Drainage". This method of raising funds for the construction works must not be confused with the legislative authority of raising the funds necessary to pay the expenses of organization and the making of topographical surveys provided for in Section 5538.

Section 8262 Laws of Missouri 1905, pp. 197-8;
Section 5516 R. S. Mo. 1909.

Upon the filing of the commissioners' report a general notice by publication, in which all the lands of the district are described, is published by the clerk of the court organizing the district, notifying the owners of the property of the filing of the report, and that they may file exceptions to said report, if they so desire. This notice is required to be published for three consecutive weeks.

Section 8263 Laws of Missouri 1905, p. 199;
Section 5517 R. S. Mo. 1909.

The statute then provides that exceptions may be filed at any time within ten days after the last day of publication of the notice, and that "all exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of such drainage districts", and authorizes the court to amend or modify the report to such extent as may be shown to be just and proper, and directs the condemnation of such rights of way as may be neces-

sary for the district to acquire.

Should the court find on this hearing that any lands "will not be benefited by reason of the improvements provided for in the 'Plan for Drainage', the court shall by its decree order and adjudge that said land shall not be taxed or charged for any part of said improvement, and thereafter the owner of such lands shall not be permitted to vote at any election held under the provision of this Article".

The clerk of the court is required to furnish a certified copy of the court decree to the Board of Supervisors, and this decree, confirming the assessment of benefits, becomes the basis of all subsequent asessments levied by the district.

> Section 8263A Laws of Missouri 1905, p. 199;
> Section 5518 R. S. Mo. 1909.

After the decree last referred to is certified to the Board of Supervisors, it is required to levy an assessment on all the lands in the district, on which benefits have been assessed, equal in amount to the cost of the works and improvements of the district, plus the working and administrative expenses of the district and damages awarded and plus ten per cent for emergencies.

> Section 8263B Laws of Missouri 1905, p. 199;
> Section 5519 R. S. Mo. 1909.

Other sections of the statute provide that the assessment thus levied shall constitute a lien to which only the lien of the State shall be paramount, and that the same shall be certified to the recorders of the counties in which lands embraced in the district are situated and made a part of the records of their offices; other sections provide for the issuing of bonds to raise the necessary funds with which to pay for the works provided for, the annual levy and collection of the assess-

ments, penalty for non-payment, the method of enforcing the payment, the maintenance of the works, etc.

It will thus be observed that the assessment complained of and sought by this proceeding to be enjoined was authorized by the Legislature to be levied on all the lands in the district.

The assessment thus authorized by the Legislature was for the purpose of paying the organization or preliminary expenses incident to and necessary to be incurred during the course of the organization of the district and prior to the levying and collection of the assessments for the purpose of paying for the construction of the works and improvements provided for in the "Plan for Drainage".

The court organizing the district judicially determined that the lands of plaintiffs in error would be benefited and should be embraced within the district. This hearing was had before any "Plan for Drainage" had been formulated, and it was not then known where the six hundred miles of ditches and the thirty miles of levees now under course of construction by the district would be located, nor how they would affect the lands of the plaintiffs in error or any of the other three thousand land owners in the district. It was sufficient to support the assessment that the trial court should find that the lands of the plaintiffs in error would be benefited by the reclamation project and embraced within the district.

Should it afterwards develop, upon the making of the topographical survey, as it did in the case of some of the lands of plaintiffs in error, that because of their very low elevation they could be used to advantage by the district as basins for the impounding of floodwaters, the plaintiffs in error were not without their remedy, for on the filing of the commissioners' report,

awarding them damages for the use of their lands as such basins by the district, the statute provides that they may file exceptions to such award of damages and are entitled to a hearing on the issue raised as to the amount or sufficiency of compensation awarded them for the use to which their lands are subjected by the district. Sec. 8263A Laws of Missouri 1905, p. 199.

It will be clearly borne in mind that there are two hearings afforded the objecting land owner in the organization of the district:

(1) At the very inception of the proceeding, when he is given an opportunity to show cause, if any he have, why his lands should not be included within the district and will not be benefited by any system of reclamation that might be subsequently developed by the engineers of the district. Sec. 8253 Laws of Mo. 1905, p. 192.

(2) After the adoption of the Plan for Drainage and the filing of the commissioners' report assessing benefits and damages that will accrue to the lands within the district by reason of the construction of the works and improvements provided for in the "Plan for Drainage", the land owner is given an opportunity of filing exceptions to such report, and is entitled to a second hearing on the issue raised by his exceptions. Sec. 8263A Laws of Mo. 1905, p. 199.

Plaintiffs in error therefore cannot successfully maintain that Section 5538 of the Revised Statutes of Missouri, 1909, is in contravention of that clause of the 14th Amendment to the Constitution of the United States which provides "that no citizen of the United States shall be deprived of his property without due process of law".

Plaintiffs in error allege in their bill "that they have at all times herein mentioned been opposed to

having their lands included in said drainage district * * * and have at all said times been opposed to the entire scheme and system of drainage, and that all proceedings relative to said drainage, whether performed or contemplated, are, so far as these plaintiffs are concerned, in vitum". (Transcript p. 13.)

In furtherance of this position taken by plaintiffs in error it will not be denied that at the return term of the court to which they had been summoned to appear they applied for a change of venue, and that the venue of the proceedings was accordingly changed from the circuit court of New Madrid County, Missouri, to the circuit court of Butler County, Missouri, State ex rel. Kochtitzky vs. Riley, 203 Mo. 175.

That they filed objections to the organization of the district and to the inclusion of their lands within the district, and that upon a full hearing had on the questions thus presented the trial court excluded 3284 acres of their lands from the proposed district, but included those lands on which the assessment now complained of was levied, and from this judgment no appeal was prosecuted by them. Little River Drainage District vs. R. R., 236 Mo. l. c. 104.

For the convenience of the court, we have printed in full such sections of the Missouri statute as we deem material or that may be of aid in determining the issue presented by this writ of error.

"Section 8251. A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this State, situated in one or more counties in this State, may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated: the name of the district, and the number of years the same is to continue; the limits of the proposed drainage district, which shall in no event embrace an area of less than six hundred and forty acres; the names and places of residence of owners of lands in said district, together with a description of the land owned by each, and such owners of real estate as are unknown may be set out in such articles as such; and said articles shall further state that the owners of real estate within said district whose names are subscribed to said articles are willing and do obligate themselves to pay the tax or taxes which may be assessed against their respective lands to pay the expenses of organization and of making the improvements that may be necessary to effect the drainage of said lands so formed into a district, and to reclaim and protect said lands from the effects of water; and after said articles of association shall be signed, the same shall be filed in the office of the clerk of the circuit court of the county in which such drainage district is located, or, if such drainage district is composed of tracts or parcels of land situated in two or more different counties, then in the office of the clerk of the circuit court of the county in which there are situated more of the lands of said district than in

any other county in said district, praying that they may be declared a drainage district under this article."

Section 8251 Laws of Missouri 1905, p. 190; Now Section 5496 R. S. Mo. 1909.

"Section 8252. Immediately after such articles of association shall have been filed, the clerk of the circuit court of the county in which the proposed drainage district is situate, and, in case the district be composed of territory situate in two or more counties, the clerk of the circuit court of the county in which the proposed drainage district is situate, and in case the district be composed of territory in two or more counties, the clerk of the circuit court of the county in which there are situated more of the lands of said district than in any other county in said district, **shall issue a summons, as now provided by law, returnable to the next term of the circuit court, directed to the several owners of real estate in said proposed district who have not signed said articles of association, or who may not have entered their appearance in said circuit court, which shall be served as summons in civil cases; and in case any owner or owners of real estate in said proposed district are unknown or cannot be found, or are non-residents, they shall be notified in the same manner as non-resident defendants are now by law notified, setting forth in said notice that the articles of association, as aforesaid, have been filed, and the purpose thereof, and that the real estate of such non-resident owner or owners situate in said district, fully describing the same, will be affected thereby and rendered liable to taxation**

for the purposes of paying the expenses of organization and of making the improvements that may be necessary to effect the drainage of the lands included in said district; and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same. Said circuit court shall thereafter maintain and have original jurisdiction co-extensive with the boundaries and limits of said district without regard to county lines for all the purposes of this act."

Section 8252 Laws of Missouri 1905, p. 191. Now Section 5497 R. S. Mo. 1909.

"Section 8253. Any owner of real estate in said proposed district who may not have signed said articles of association may object to the organization and incorporation of said drainage district, after having been duly summoned, shall, on or before the first day of the term of the court to which he may have been summoned to appear, and file his objection, or objections, if any he have, why such drainage district should not be organized and incorporated, or why his land, or any part thereof, will not be benefited by the proposed drainage, or should not be embraced in said drainage district, and made liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without unnecessary delay, and in case all such objections are overruled, the circuit court shall by its order, duly entered of record, duly declare and decree said drainage district a **PUBLIC CORPORATION OF THIS STATE**, for a term not exceeding the time mentioned in the said articles of association signed and filed. In case any owner

of real estate included in said district shall satisfy the court that his real estate, or any part thereof, has been wrongfully included therein and will not be benefited thereby, then the court may exclude such real estate as will not be benefited and declare and decree the remainder a district as prayed. Provided, however, that the time for which said drainage district is so incorporated may, if necessary to properly complete the plan or system of drainage adopted, or to raise the money by assessments to pay for the work contracted, or to pay the bonds that have been issued therefor, **or to properly maintain and keep in repair** the said drainage system and improvements, be extended by the said circuit court of the county in which said district or the greater part thereof lies, at the request of the said district acting through its board of supervisors; said board shall at any time within three years before the expiration of the corporate existence of such district determine by resolution placed of record the time desired and necessary in their judgment that is required for such extension, and shall submit a proposition specifying the time of such extension to the land owners of such district, to be voted upon at a regular or called meeting of such land owners, at such time and place in said district as the board of supervisors may designate, and upon such notice, containing the proposition, and time of the proposed extension being given as is provided for in Section 8256 of this chapter, the owners of the land shall meet, vote upon and decide said proposition in the manner provided in Section 8255. If a majority of the land owners of such district vote in

favor of such proposition and extension, as shall appear from a canvass of said votes, properly certified by the chairman and secretary of such meeting of the board of supervisors of the said district, the said board shall, at or before the next term of the circuit court thereafter in the proper county, present to such court a petition containing and specifying the proposition and time of extension, and the fact and result of the election held thereon, and praying on behalf of such land owners of said district the extension of the corporate existence of such drainage district for the time specified, and such application shall be filed and docketed for trial and hearing at said term. Any owner of real estate in said district may, at any time before the hearing of such application, file his objection, if any he have, why such extension should not be granted; and all objections shall be heard by the court in a summary manner, without unnecessary delay, and in case all such objections are overruled, the court shall, by its order entered of record, duly declare and decree that the corporate existence of such district be extended to and for the time specified, and a certified copy of such decree shall be filed with the Secretary of State and also one with the clerk of the county court. In case the court should find that such extension of corporate existence should not be allowed, the said petition and application shall be dismissed at the cost of the said drainage district."

Section 8253 Laws of Missouri 1905, p. 192. Now Section 5499 R. S. Mo. 1909.

"Section 8255. Within thirty days after the

circuit court shall have declared any drainage district organized, the clerk of such court shall, upon fifteen days' notice, call a meeting of the owners of real estate situated in said district to meet at some public place in such district, for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district and residents of the county or counties in which such district is situated; the land owners, when assembled, shall organize by the election of the chairman and secretary of the meeting, who shall conduct the election; and at such election each and every acre of land shall represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in such district, and the five persons receiving the highest number of votes shall be declared elected as supervisors; and they shall immediately by lot determine the terms of their office, which shall be respectively one, two, three, four and five years, and until their successors are elected and qualified."

Section 8255 R. S. Mo. 1899.
Now Section 5507 R. S. Mo. 1909.

"Section 8256. Every year after the election of the first board of supervisors, at such time and place in said district as the board of supervisors may designate, and upon not less than fifteen days' notice, the owners of the lands in such district shall meet and elect one supervisor therefor in like manner as in the preceding section, who shall hold his office for five years and until his successor is elected and qualified;

and in case of a vacancy in any office of supervisor, the remaining supervisors may fill such vacancy until the next annual election, when a successor shall be elected for the unexpired term; the notice required by this and the preceding section shall be given by publication in some newspaper published at the county seat of the county in which such district was organized, and if there be no such newspaper, then by posting not less than six written or printed hand-bills in different public places in the district."

Section 8256 R. S. Mo. 1899.

Now Section 5508 R. S. Mo. 1909.

"Section 8258. The board of supervisors shall, immediately after their election, choose one of their number chairman, and another secretary. Said board may adopt a seal, with a suitable device, and shall keep a record of all its proceedings open to the inspection of all the owners of real estate in its drainage district. The board shall annually make report of what work has been done, to the owners of the real estate in the district, and publish a statement of its receipts and expenditures. All members of the board, except the secretary, shall serve without compensation. The secretary shall receive for his services the same fees as allowed clerks of county courts for like services, payable out of the drainage district fund."

Section 8258 R. S. Mo. 1899.

Now Section 5510 R. S. Mo. 1909.

"Section 8259. After the board of supervisors of any drainage district organized as aforesaid has been elected as in the preceding sec-

tions prescribed, the said board shall appoint a chief engineer and as many assistant engineers as they may think necessary, but not to exceed one for each county when the district is composed of lands situated in more than one county, and such engineers when appointed shall be denominated the 'board of engineers'. The chief engineer shall have control of the works in said district, and assign such portions thereof as he may deem fit to each assistant. The chief engineer may, by and with the consent of the board of supervisors, consult any eminent engineer or engineers and obtain his or their opinion and advice concerning the drainage of said district. The said 'board of engineers' shall make a complete topographical survey of the said district and submit the same to the board of supervisors with maps and profiles of said survey and a full and complete plan for draining and reclaiming the lands in said district from the overflow of or damage by water or floods; and also the physical characteristics and location of any right of way, road-bed, bridge or bridges, and other property or improvements in said district belonging to or under control of any railroad company; and shall also report the location of any and all public highways which may be crossed by the right of way of any ditch, levee or other improvement planned for said district, together with the estimated cost of bridges and approaches across said highway and made necessary by reason of the aforesaid improvements and drainage."

Section 8259 Laws of Missouri 1905, p. 194.
Now Section 5511 R. S. Mo. 1909.

"Section 8263U. **Levy of 25 Cents Per Acre May Be Made for Preliminary Work.** As soon as any drainage district shall have been organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power and authority to levy upon each acre of land in the district, not to exceed twenty-five cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the opinion of its board of supervisors it be desirable to do so, make such level assessment for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work proposed may have failed or have been found impractical."

Section 8263U Laws of Missouri 1909, p. 628. Now Section 5538 R. S. Mo. 1909.

"Section 8259a. The board of engineers, through its chief engineer, shall make a report in writing to the board of supervisors once every twelve months, and oftener if said board of supervisors so require. Upon the receipt of the final report of said board of engineers concerning said topographical survey, and the plan for draining and reclaiming the lands in said district, the board of supervisors may, after con-

sultation with the said board of engineers or those in attendance at the meeting of said board of supervisors, adopt said report, or a modification thereof, and thereafter such adopted report shall be the plan for the drainage, reclamation and protection from overflow or damage by water of the lands in said district, and shall be known and designated as 'Plan for Drainage', which plan shall be filed with the secretary of the board of supervisors and by him copied into the records of said board of supervisors."

Section 8259a Laws of Missouri 1905, p. 195. Now Section 5512 R. S. Mo. 1909.

"Section 8260. Within twenty days after the adoption by the board of supervisors of the aforesaid 'plan for drainage' provided for in Section 8259a, the secretary of said board shall prepare and file a certified copy thereof with the clerk of the circuit court having jurisdiction of said drainage district as aforesaid, and at the same time the board of supervisors shall file with the said clerk of the circuit court a petition asking the judge of said court to appoint commissioners for viewing said lands and assessing benefits and damages, as hereinafter provided. Within thirty days after the filing of such petition, the judge of said court, either in term time or in vacation, shall, by an order, appoint three commissioners who shall be freeholders residing within the county or counties in which said district is located, and who shall not be interested in the formation of said district nor of kin to any party interested therein. The said commissioners shall act together as a board of commissioners in assessing the benefits

and damages to the lands and all other property situated and being in said district and benefited or damaged by reason of the construction of any ditch, drained dyke, levee, or other works and improvements of said districts."

Section 8260 Laws of Missouri 1905, p. 196.
Now Section 5514 R. S. Mo. 1909.

"Section 8262. The commissioners shall, as soon after their first meeting as possible, go over and inspect and examine the lands in said district, the railroad rights-of-way, road-beds, bridges, culverts, depot grounds, grades, and all other railroad property in said district; and shall also inspect and examine all other improvements, highways and bridges belonging to any county or corporation and which may be affected by the proposed drainage and reclamation works and improvements, and shall also examine the streams, water-courses, ditches, ponds, lakes and bayous within the district, or which may be partly within and partly without said district. A majority of said commissioners shall control and decide all questions. They shall assess, as hereinafter directed and according to the rules hereinafter prescribed, the amount of benefits which will accrue to each tract or parcel of land and corporate property above named, by virtue of the works and improvements of said drainage district; they shall also, where a right-of-way is necessary for any of the improvements or works contemplated in the 'plan for drainage', assess the amount of the benefits which will accrue to the tract of land through which the right-of-way is necessary, and also assess the fair cash value of the land

necessary to be taken and used for such right-of-way and improvements, and deduct such actual value from such benefits, and the difference shall be the benefits assessed to the tract of land, and where the value of the land necessary to be taken and used exceeds the benefits, then the amount of such excess shall be specified as damages in the report of said commissioners. In case the whole tract of land is necessary and is taken and used, then the fair cash value of said lands shall be specified as damages in said report. Each tract or parcel of land, rights-of-way, and railroad road-bed, bridges, culverts and depots within the district shall bear its share of the entire cost and expenses incurred by said district in making said works and improvements in proportion to the benefits assessed, whether such improvements be made on the tract or parcel of land, rights-of-way, or railroad road-bed or not. The commissioners, in estimating the benefits to lands, railroad property, rights-of-way, railroad road-beds, not traversed by such works and improvements, shall not consider what benefits will be derived by said lands after other ditches, improvements or drainage plans shall be constructed, but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage, or an outlet for drainage, or protection from overflow or damage by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, and no lands lying below shall be assessed for the benefits of lands above, but all assessments shall be made on the basis of benefits derived and secured by

reason of the construction of said improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water. In estimating benefits and damages the commissioners shall take into consideration any other drain or drains, ditch or ditches, levee or levees or system of drainage in said district which have already been constructed. The taxes levied and assessed to pay for such works and improvements in said drainage district shall in no case exceed the benefits assessed. The benefits to railroad property, right-of-way, and road-bed, shall be assessed according to the increased efficiency and value added thereto by reason of and the protection derived from the aforesaid drainage works and improvements. The commissioners shall in no case change or modify the 'plan for drainage' heretofore provided for in Section 8259a. Said commissioners shall, by and with the advice of the board of engineers, estimate the cost of the ditches, drains, canals, levees, dykes and all other drainage works and improvements required in said district to protect and reclaim said lands and property. The secretary of the board of supervisors or his deputy shall accompany said commissioners while inspecting, examining and assessing the benefits and damages to the property in said district, and shall perform all clerical work for said commissioners, including the preparation of their report to the court. Said report shall contain a statement of the estimated cost of the works and improvements to be made in said district for the protection and reclamation of the properties above named, situated and being

in said district, and shall also contain a description of all the lands in said district, and the names of the owners thereof, and a general description of all the railroads, rights-of-way, road-beds and depot grounds, and the names of the corporation or corporations to which they belong at the date of the decree of the court organizing said district. Opposite each tract of land and railroad company's property shall be written the amount of the assessed benefits to it, in a column so headed, and in another column the amount of damages, if any, assessed against it, which report shall be signed by a majority of the commissioners and filed with the clerk of said circuit court organizing said drainage district. Said commissioners may at any time call upon the attorney of said district for legal information concerning their duties. Said commissioners shall, in their investigation and examination of the lands and corporate property in said district, be accompanied by the chief engineer or such of his assistants as they may require, and, whenever requested by said board, the chief engineer shall give his opinion in writing. Said commissioners shall also make a report to the board of supervisors of the number of days each has been employed, and the actual expenses of each. Said commissioners shall each be paid $5.00 per day for their services, and in addition thereto necessary expenses."

Sec. 8262 Laws of Missouri 1905, pp. 197-8.
Now Section 5516 R. S. Mo. 1909.

"Section 8263. Upon the filing of the report of the commissioners, the clerk of said circuit

court shall give notice thereof by causing a publication to be made once a week for three consecutive weeks in some newspaper published in each county in the district. It shall not be necessary for said clerk to name the parties interested, and it shall be sufficient to say: 'Notice is hereby given to all persons interested in the following-described lands and property in ——— County, Missouri, (here describe said lands and property) included within "——— drainage district", that the commissioners heretofore appointed to assess benefits and damages to the property and lands situated in said "——— drainage district" filed their report in the office of the clerk of the circuit court of ——— County, Missouri, on the ——— day of ———, 190—, and you, and each of you, are hereby notified that you may file exceptions to said report within the time fixed by law.

'....., Clerk of
Circuit Court of ——— County.' "

Section 8263 Laws of Missouri 1905, p. 199.
Now Section 5517 R. S. Mo. 1909.

"Section 8263a. The drainage district, or any owner of land or other property in said district, may file exceptions to said report to any assessment for either benefits or damages, within TEN DAYS after the last day of publication of the notice provided for in the preceding section. All exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of such drainage district. If no exceptions are filed, or, if filed and overruled, the court shall approve and confirm the report, but if the re-

port is amended or modified the court shall render a decree accordingly. In its decree the court shall adjudge the payment of cost made on the hearing of said exceptions as to it may seem just and proper, and shall condemn any land and property that may be needed for right-of-way or material following as nearly as possible the procedure in cases of condemnation of rights-of-way of railroads. The clerk of said circuit court shall, on approval and confirmation of the report of the commissioners, make a certified copy thereof as approved and confirmed and transmit it to the county clerk of each county in the drainage district, and also to the secretary of the board of supervisors. The county clerk shall file said certified copy, and record the same in a well-bound book to be furnished him by said drainage district."

Section 8263a Laws of Missouri 1905, p. 199. Now Section 5518 R. S. Mo. 1909.

"Section 8263b. As soon as the list of lands, with the assessments and the decree and judgment of court, have been filed in the office of the county clerk, as provided in Section 8263a of this act, then the board of supervisors shall at once levy a tax on the lands in said district to which benefits have been assessed, equal in amount to the cost of such drainage works and improvements as estimated by the aforesaid commissioners, plus the actual expenses of organizing said district, the probable working and administrative expenses and damages (as estimated by the board of supervisors) in the completion of said works and improvements and the carrying out of the objects of said district. And

in case bonds are issued as provided herein and hereafter, then the amount of the interest (as estimated by said board of supervisors) which will accrue on such bonds shall be included and added to the said tax. The said tax shall be apportioned to and levied on each tract of land or property in said district in proportion to the benefits assessed and not in excess thereof. The said levy of the tax shall be evidenced and certified by the board of supervisors to the county clerk of each county in which lands of said district are situate, which certificate shall be substantially in the following form:

State of Missouri, County of ————
To ———————— ss.
County Clerk of Said County.

This is to certify that by virtue of the provisions and terms of Section 8263b of Article 3, Chapter 122, (Lands) Revised Statutes of Missouri, the board of supervisors of ——— drainage district, including lands and property in the counties of ——— in the State of Missouri, have and do hereby levy the tax provided for in said section on the lands and property situated in your county, described in the following table; in which table are: First, the names of the owners of said lands and property, as they appeared in the decree of the circuit court organizing said district; Second, the description of the said lands and property opposite the names of said owners; and third, the amount of said tax levied on each tract of land or piece of property:

(Here insert such table.)

The said tax shall be collected and payable in twenty annual installments, the amount of each

annual installment will be certified to you not later than the 1st day of March in each year.

Witness the signature of the president of the said board of supervisors, attested by the seal of said district and the signature of the secretary of said board this —— day of ———, A. D. 190—.

————————, President.

(Seal) ————————, Secretary.

The said county clerk shall file said certificate in his office and record the same in the book referred to in Section 8263c of this act."

Section 8263B Laws of Missouri 1905, p. 199. Now Section 5519 R. S. Mo. 1909.

BRIEF.

I.

The General Assembly of Missouri has the legal and constitutional right to create drainage and levee districts and to fix their territorial limits, and may also determine the amount of the assessment against each tract of land within the district. It also has the right to delegate these powers to any agency of the State created by it.

Little River Drainage District vs. R. R., 236 Mo. 94, l. c. 111 and 112.

Egyptian Levee Co. vs. Hardin, 27 Mo. 495.

Columbia Bottom Levee Co. vs. Meier, 39 Mo. 53, l. c. 57.

Morrison vs. Morey, 146 Mo. 543, l. c. 561.

Land and Stock Co. vs. Miller, 170 Mo. 240, l. c. 251-2-3.

Asphalt Co. vs. French, 158 Mo. 534.

Meier vs. St. Louis, 180 Mo. 391, l. c. 408.

Heman vs. Wabash R.R., 206 Mo. 179,l. c. 189.

In Hagar vs. Reclamation, 111 U. S. 701, 28 L. Ed. 569.

Walston vs. Nevin, 112 U. S. 164.

William vs. Eggleston, 170 U. S. 304; 42 L. Ed. 1047.

Spencer vs. Merchant, 125 U. S. 345.

Bauman vs. Ross, 167 U. S. 548, 42 L. Ed. 270.

French vs. Asphalt Co., 181 U. S. 324, 45 L. Ed. 879.

Soliah vs. Heskin, 222 U. S. 522; 56 L.Ed.294.

C. C. C. and St. L. Ry. Co. vs. Porter, 210 U. S. 177; 52 L. Ed. 1012.

New Orleans Gas Light Co. vs. Drainage Commissioners, 197 U. S. 453; 49 L.Ed. 831.

II

It is within the power of the Legislature of Missouri to charge the property within the special assessment district, at a level rate, with the cost of improvements, and apportion the same either according to the front-foot rule, or according to the area (acreage) rule, or according to special benefits derived. In either event it acts within constitutional limits.

Chicago B. & Q. Ry. Co. vs. Ills., 200 U. S. 561; 50 L. Ed. 596.

Spencer vs. Merchant, 125 U. S. 345; 31 L. Ed. 763.

Wight vs. Davidson, 181 U. S. 371; 45 L. Ed 900.

Cass Farm Co. vs. Detroit, 181 U. S. 395; 45 L. Ed. 914.

Detroit vs. Parker, 181 U. S. 399; 45 L. Ed. 917.

Webster vs. Fargo, 181 U. S. 394; 45 L. Ed 916.

Little River Drainage District vs. R. R., 236 Mo. 94, l. c. 109-110.

Egyptian Levee Co. vs. Hardin, 27 Mo. 495.

Columbia Bottom Levee Co. vs. Meier, 39 Mo. 53.

Prior vs. Construction Co., 170 Mo. 439, l. c. 448.

Meier vs. St. Louis, 180 Mo. 391.

Asphalt Co. vs. French, 158 Mo. 534.

N. P. R. Co. vs. Pierce Co., 23 L. R. A. (N. S.) 286.

Gilsonite Paving Co. vs. Fair Association, 231 Mo. 589.

Pleadwell vs. Glass Co., 151 Mo. App. 51.

Construction Co. vs. Shovel Co., 211 Mo. 531-534.

French vs. Barber Asphalt Pav. Co., 181 U. S. 45; L. Ed. 879.

Munsen et al. vs. Board of Com., 43 La. Ann. 15.

Wallace vs. Shelton, 14 La. Ann. 498.

Caton vs. Western Clay Drainage District, 112 S. W. 145.

Sheley vs. Detroit, 45 Mich 431, 8 N. W. 52.

Cremer vs. Allen, 3 Mo. App. 545, l. c. 548.

Cooley on Taxation, 1st Ed., p. 454.

III.

The Legislature of Missouri has the legal and constitutional right to apportion the costs of the improvements upon the property in The Little River Drainage District according to the frontage or area rule without judicial inquiry as to the value of benefits the property assessed would receive, and the exercise of such a power will not constitute the taking of private property without due process of law under either the State or Federal Constitution.

Brisco vs. Rudolph et al., 221 U. S. 547; 55 L. Ed. 848.

Spencer vs. Merchant, 125 U. S. 345; 31 L. Ed. 763, l. c. 767.

Hagar vs. Reclamation District, 111 U.S. 701; 28 L. Ed. 569.

French vs. Barber Asphalt Paving Co., 181 U. S. 324; 45 L. Ed. 879.

Tonawanda vs. Lyon, 181 U. S. 389; 45 L. Ed. 908.

Webster vs. Fargo, 181 U. S. 394; 45 L. Ed. 912.

Cass Farm Co. vs. Detroit, 181 U. S. 395; 45 L. Ed. 914.

Detroit vs. Parker, 181 U. S. 395; 45 L. Ed. 916.

Shumate vs. Heman, 181 U. S. 402; 45 L. Ed. 922.

Wormley vs. District of Columbia, 181 U. S. 402; 45 L. Ed. 921.

Williams vs. Eggleston, 170 U. S. 304; 42 L. Ed. 1047.

Heman vs. Allen, 156 Mo. 534.

Keithe vs. Bingham, 100 Mo. 300.

Barber Asphalt Paving Co. vs. French, 158 Mo. 534.

Smith vs. Worchester, 182 Mass. 232, 59 L. R. A. 728.

Heman vs. Gilliam, 171 Mo. 258, l. c. 264.

St. Charles ex rel. Budd vs. Deemar, 174 Mo. 122, l. c. 124.

Meier vs. St. Louis, 180 Mo. 391-408.

Ross vs. Gates, 183 Mo. 338, l. c. 347.

Barber Asphalt Pav. Co. vs. Munn, 185 Mo. 552, l. c. 565.

People ex rel. Scott vs. Pitt., 169 N. Y. 521, 58 L. R. A. 372, l. c. 383-84.

Arnold vs. Knoxville, 115 Tenn. 210, 3 L. R. A. (N. S.) 837.

Cooley on Taxation, 1st Ed., pp. 36-40.

Prior vs. Construction Co., 170 Mo. 439.

Construction Co. vs. Shovel Co., 211 Mo. l. c. 532.

Gilsonite Roofing Co. vs. Fair Assoc., 231 Mo. 589.

Ross vs. Board of Supervisors, 1 L. R. A. (N. S.) 437.

Page & Jones on Taxation by Assessment, Sec. 123. & 728

IV.

The constitutional provision prohibiting the taking of private property for public use without compensation is a limitation of the exercise by the State of the right of eminent domain, and not a limitation on the taxing power of the State.

Little Tarkio Drainage District vs. Richardson, 237 Mo. 49, l. c. 71.
Keith vs. Bingham, 100 Mo. 300, l. c. 306.
Heman vs. Schulte, 166 Mo., l. c. 419.
St. Louis vs. Buss, 159 Mo., l. c. 12.
Dillion on Municipal Corporations, 3rd Ed., Sec. 738.
Am. & Eng. Ency. of Law, 1st Ed., pp. 18-20.
Page & Jones on Taxation by Assessment, Sec. 110.

V.

It is the settled law in Missouri that special assessments for local improvements are referable to the taxing power of the State.

Construction Co. vs. Shovel Co., 211 Mo., l. c. 531.
Barber Asphalt Co. vs. French, 158 Mo. 534.
St. Joseph vs. Farrell, 106 Mo. 437.
French vs. Barber Asphalt Co., 181 U. S. 45; L. Ed. 879, l. c. 887.
Spencer vs. Merchant, 125 U. S. 345; 31 L. Ed. 763.
Cooley on Taxation, 1st Ed., pp. 430-431.

VI.

The legislative determination of the benefits derived or the necessity and advisability of a local assess-

ment is conclusive and final, and is not subject to judicial review.

French vs. Barber Asphalt Co., 181 U. S. 324, l. c. 338-9; 45 L. Ed. 879.
Hagar vs. Reclamation Dist., 111 U. S. 701; 28 L. Ed. 569.
Chadwick vs. Kelly, 187 U. S. 540; 47 L. Ed. 293.
L. & N. R. R. Co. vs. Barber Asphalt Paving Co., 197 U. S. 430; 49 L. Ed. 819.
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112; 41 L. Ed. 369.
Spencer vs. Merchant, 125 U. S. 345; 31 L. Ed. 763.
Prior vs. Construction Co., 170 Mo., l. c. 451.
Barber Asphalt Co. vs. French, 158 Mo. 534.
Egyptian Levee Co. vs. Hardin, 27 Mo. 495.
St. Joseph vs. O'Donoghue, 31 Mo. 345.
Meier vs. St. Louis, 180 Mo. 391.
People vs. Brooklyn, 4 N. Y. 419.
N. P. R. R. Co. vs. Seattle, 12 L. R. A. (N. S.) 121.
Smith vs. Worchester, 182 Mass. 232; 59 L. R. A. 728.
Spencer vs. Merchant, 100 N. Y. 585.
Webster vs. City of Fargo, 181 U. S. 394; 45 L. Ed. 912.
Cooley on Taxation, 1st Ed., p. 446.

VII.

A legislative finding of benefits will be presumed after an assessment has been authorized. Both courts and legislature take notice of the topography of the State, and that wet, swampy and overflowed lands will be rendered more habitable and productive and that

the public health will be benefited by removing water which causes unhealthy conditions.

Hagar vs. Reclamation District, 111 U. S. 701; 28 L. Ed. 569.

Fallbrook Irrigation District vs. Bradley, 164 U. S. 112; 41 L. Ed. 360.

French vs. Barber Asphalt Co., 181 U. S. 324; 45 L. Ed. 879.

C. B. & Q. R. R. vs. Drainage Commissioners, 200 U. S. 561; 49 L. Ed. 819, l. c. 821.

Little River D. D. vs. R. R., 236 Mo. 94, l. c 111 and 112.

L. & N. R. R. Co. vs. Barber Asphalt Co., 197 U. S. 430; 49 L. Ed. 819.

Mound City Land Co. vs. Miller, 170 Mo. 240.

Construction Co. vs. Shovel Co., 211 Mo. 554.

Prior vs. Construction Co., 170 Mo. 439.

Meier vs. St. Louis, 180 Mo. 391.

N. P. R. R. vs. Pierce County, 23 L. R. A. (N. S.) 286.

State ex rel. vs. County Commissioners, 60 L. R. A. 161.

Smith vs. Worchester, 182 Mass. 232, 59 L. R. A. 728.

Cooley on Taxation, 1st Ed., pp. 430, 450.

VIII.

The act of the Legislature in levying assessments for a definite sum against each lot or acre of land for special improvements is conclusive alike of the necessity of the work and of its benefits to the property assessed; and the Legislature in so doing is not compelled to give notice to the parties resident within the district or to give a hearing before itself or one of its commit-

tees, or any other tribunal, on the question of whether the property so included within the district is in fact benefited.

Hagar vs. Reclamation Dist., 111 U. S. 701; 28 L. Ed. 569.

Parson vs. District of Columbia, 170 U. S. 45; 42 L. Ed., l. c. bottom 947.

Goodrich vs. Detroit, 184 U. S. 432; 46 L. Ed., l. c. 631.

Chadwick vs. Kelly, 187 U. S. 540; 47 L. Ed. 293, l. c. 295.

L. &. N. R. R. vs. Barber Paving Co., 197 U. S. 430; 49 L. Ed. 819.

Williams vs. Eggleston, 170 U. S. 304; 42 L. Ed. 1047.

Davidson vs. New Orleans, 96 U. S. 97; 24 L. Ed. 616.

Cooley on Taxation, 2nd Ed., p. 149.

Hammett vs. Philadelphia, 65 Penn. State, l. c. 155.

Ramsey County vs. Lewis Co., 82 Minn. 400, 53 L. R. A. 421.

Jones & Page on Taxation by Assessment, Sec. 123. & 718

IX.

Plaintiffs in error in their assignment of errors (brief pp. 16 and 17, Assignments Nos. 1, 3 and 4) urge upon this court that the statute in question is in contravention of three provisions of the Federal Constitution, none of which were alleged in their amended bill (transcript p. 15) and none of which were considered by the Supreme Court of Missouri.

Questions not clearly raised in the court below will

not be considered in this court, and an assignment of errors cannot be availed of to import questions into this case which are not shown by the record to have been raised and passed on below.

Cleveland & Pittsburg R. R. Co. vs. City of Cleveland, No. 95, decided Nov. 16, 1914.

Ansbro vs. United States, 159 U. S. 695; 40 L. Ed. 310.

Oxley Stave Co. vs. County of Butler et al., 166 U. S. 648, l. c. 653; 41 L. Ed. 1149.

Henkel vs. City of Cincinnati, 177 U. S. 171; 44 L. Ed. 721.

Chicago I. & L. Ry. Co. vs. McGuire, 196 U. S. 128; 49 L. Ed. 413.

Zadig vs. Baldwin, 166 U. S. 485, l. c. 488; 41 L. Ed. 1087.

Keokuk & Hamilton Bridge Co. vs. People of Illinois, 175 U. S. 626, l. c. 633; et seq.; 44 L. Ed. 299.

Harding vs. Illinois, 196 U. S. 78; 49 L. Ed. 394.

C. & O. Ry. Co. vs. McDonald, 214 U. S. 191; 53 L. Ed. 963.

Comell vs. Green, 163 U. S. 75, l. c. 80; 41 L. Ed. 76.

Maxwell vs. Newbold, 59 U. S. 18, How. 511; 15 L. Ed. 506.

Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157.

Plaintiffs in error attempted to enlarge the Federal question raised in their bill by insisting before the Supreme Court of Missouri that the statute in question was in contravention of other provisions of the Federal Constitution than the one clause of Section I of the 14th Amendment providing that no person shall be deprived of his property without due process of la.w

It is now too late to raise such additional questinos. The opinion rendered by the Supreme Court of Missouri discloses that the additional Federal questions attempted to be raised were not considered by it (transcript p. 22), and this court has declined to consider any additional questions thus attempted to be imported into a case.

Pim vs. St. Louis, 165 U. S. 273; 41 L. Ed. 715.
Fullerton vs. State of Texas, 196 U. S. 192; 49. L. Ed. 443.
Loeber vs. Schroeder, 149 U. S. 580; 37 L. Ed. 856.

X.

Should, however, the court take the view that these questions are properly before it, we submit as a complete answer to the contention of plaintiffs in error:

(a) There is no "contract" between the State and the individual of the State with respect to the taxing power of the State. The imposition of a tax or an assessment is a governmental act to which the contract clause of the Constitution of the United States has no application.

County Court of Cape Girardeau vs. John T. Hill, 118 U. S. 68; 30 L. Ed. 73, l. c. 75.
Cooley on Taxation, 1st Ed., p. 13, p. 484.
Page & Jones on Taxation by Assessment, Sec. 166.
Burrough on Taxation, Sec. 105, p. 253.
Gray on Limitation of Taxing Power, Section 1830.
State ex rel. vs. Snyder, 139 Mo., l. c. 553.

(b) The creation of a public corporation by the State creates no contract between the State and the

corporation; nor between the State and the individual members of the corporation; nor between the members themselves. A contract within the meaning of Section 10, Article I of the Constitution of the United States is one based on mutual assent and consideration.

Hunter vs. Pittsburg, 207 U. S. 161; 52 L. Ed., l. c. 158.

Morley vs. Railroad, 146 U. S. 162; 36 L. Ed. 925, l. c. 929.

State of Louisiana vs. Mayor et al., 109 U. S. 255; 29 L. Ed. 936.

Louisiana vs. Pittsburg, 105 U. S. 285; 26 L. Ed. 1093.

Columbia Bottom Levee Company vs. Meier, 39 Mo. 53.

Gray on Constitutional Limitation, Sec. 968.

Sedgwick on the Construction of Statutory and Constitutional Law, 2nd Ed., pp. 581, 599, 600 and 603.

(c) A legislative act changing or altering the character of a public corporation is not an impairment of a contract either as to the corporation or its constituent members.

Hunter vs. Pittsburg, 207 U. S. 161; 52 L. Ed., l. c. 178, 179.

East Hartford vs. Hartford Bridge Company, 10 How. 511, 534; 13th L. Ed. 518, l. c. 528, 529.

Williamson vs. New Jersey, 130 U. S. 189; 32 L. Ed. 915, l. c. 919.

County Court of Cape Girardeau vs. Hill, 118 U. S. 68; 30 L. Ed. 73, l. c. 75.

Squaw Creek Drainage District vs. Turney, 235 Mo. 80.

State ex rel. vs. Chariton Drainage District, 192 Mo. 517, l. c. 520.

Page & Jones on Taxation by Assessment, Section 166.

(d) There is no new obligation or duty created or imposed by Section 5538 of the statute.

(1) Because the incorporation of The Little River Drainage District and the obligations upon the land included therein to bear its proportionate share of burdens imposed were contemporaneous. The Legislature by this section only fixed the maximum amount of the assessment authorized by it, and apportioned it uniformly upon each acre in the Drainage District.

Laws of Missouri 1905, p. 191, Section 8252.

Revised Statutes 1909, Section 5497.

State ex rel. vs. Bates, 235 Mo. 262.

N. Pacific Ry. Co. vs. Pierce Co. et al., 51 Wash. 12; 97 Pac. 1099.

French vs. Barber Asphalt Co., 181 U. S. 324; l. c. 332, 333, 338; 45 L. Ed. 879, l. c. 885, 887, 890.

(2) All property in the State of Missouri is subject to taxation by the Legislature of that State, unless expressly exempted by the Constitution of the State. There is nothing in the original drainage act, nor the amendments thereto, exempting the property of plaintiffs in error from taxation; nor is there any provision of the Constitution of the State plead or cited exempting their property from the same rule of taxation that is applicable to all other property in the State.

The Legislature in enacting Section 5538 expressly authorized the Board of Supervisors of the Drainage District to levy an assessment not to exceed twenty-five cents per acre on all lands in the district to pay for the organization and the preliminary surveys; hence, plaintiffs' lands, like all oth-

er lands in the district, are subject to this assessment.

St. Louis vs. United Railways, 210 U. S. 266; 52 L. Ed. 1054.

Sedgwick on the Construction of Statutory and Constitutional Law, 2nd L. Ed., p. 599.

(e) No one can have a vested right which he can claim to be exempt from the lawful exercise of the State's police power.

Mugler vs. Kansas, 123 U. S. 656, 659; 31 L. Ed. 205, l. c. 209.

Butchers' Union Slaughter House Co. vs. The Crescent City Live Stock, Landing and Slaughter House Co., 111 U. S. 746; 28 L. Ed. 585, l. c. 587.

Chicago, B. & Q. Ry. Co. vs. Ills., 200 U. S. 561; 50 L. Ed. 596.

Little River D. D. vs. Railroad, 236 Mo. 94.

(f) Section 5538 of the Revised Statutes of Missouri, 1909, is not in violation of that clause of Section 1 of Article 14 of the Federal Constitution prohibiting a State from making or enforcing a law abridging the privileges and immunities of citizens of the United States.

Slaughter House cases, 16 Wall. 36; 21 L. Ed. 394.

Rosenthal vs. People of New York, 220 U. S. 260.

Bill's Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232; 33 L. Ed. 892.

Lumbard vs. West Chicago Park Com., 181 U. S. 33; 45 L. Ed. 731.

Davidson vs. New Orleans, 96 U. S. 97; 24 L. Ed. 616, l. c. 619.

(g) Section 5538 is not in contravention of that clause of the 14th Amendment to the Federal Constitution providing for the equal protection of the law.

Atkins vs. Kansas, 191 U. S. 207; 48 L. Ed. 148.

Slaughter House cases, 16 Wall 36; 21 L. Ed. 394.

Bill's Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232; 33 L. Ed. 892.

Lumbard vs. West Chicago Park Com., 181 U. S. 33; 45 L. Ed. 731.

Davidson vs. New Orleans, 96 U. S. 97; 24 L. Ed. 616, l. c. 619.

(h) Nor is section 5538 of the Revised Statutes of Missouri, 1909, in conflict with Article 5 of the Amendments to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without compensation.

Davidson vs. New Orleans, 96 U. S. 97; 24 L. Ed. 616.

Merchants' & Manufacturers' Nat. Bank vs. Penn., 167 U. S. 461; 42 L. Ed. 236.

Dennis Hoboken Land Co., 18 How. 272; 15 L. Ed. 372.

Bill's Gap R. Co. vs. Penn., 134 U. S. 232; 33 L. Ed. 892.

Revised Statutes of Missouri 1909, Sec. 5697.

Should any doubt arise about the constitutionality of this section of the Missouri statute, the doubt should be resolved in favor of the State. The Supreme Court of Missouri, in speaking upon its drainage statute, has said:

"Legislation upon the subject of drainage of

wet and swamp lands * * * had in view a great public purpose; that is, of accomplishing results which would be conducive to the public health as well as to the convenience and welfare of the people of this State. Therefore, the provisions enacted by the lawmakers of this State, for the purpose of accomplishing the result as indicated, should not be confined by a technichal construction within an extremely narrow compass. Such construction should be placed upon provisions of that character as will be in harmony with the intent of the lawmaking power, and which will facilitate the accomplishment of the purposes indicated by the legislative enactment upon the subject in hand."

State ex rel. vs. Bates, 235 Mo. 262, l. c. 293.
State ex rel. vs. Bugg, 224 Mo. 537, l. c. 554.

XI. ...

The police power of a State embraces regulations designed to promote public convenience, public health, public morals and public safety. Any law providing for the reclamation of swamp lands is an exercise of the police power of the State, and not prohibited by the 14th Amendment to the Constitution of the United States.

Chicago, B. & Q. R. R. Co. vs. Illinois, 200 U. S. 561; 50 L. Ed. 596.
Little River D. D. vs. Railroad, 236 Mo. 94.

ARGUMENT.

The constitutionality of Section 5538 of the Revised Statutes of Missouri, 1909, is challenged by plaintiffs in error in their amended petition. In it they have pointed out and enumerated the different clauses, sections and articles of State and Federal Constitutions which they claim were violated by Section 5538 supra. The enumerated sections "specially set up" are as follows:

(1) That said act (the act approved June 1st, 1909, being Section 5538 of the statute) is in contravention of Section 3 of Article 10 of the Constitution of Missouri, which requires all taxes to be for public purposes, and uniform;

(2) That said Section 5538 is also in contravention of Section 4 of Article 10, which requires all property to be taxed in proportion to its value;

(3) That said Section 5538 is in contravention of Section 21 of Article 2 of the State Constitution, which forbids the taking of private property for public use without just compensation;

(4) That Section 5538 of the statute violates Sections 11 and 12 of Article 10 of the Constitution, which prescribes the aggregate rate on how taxes for county, city, school and building purposes may be levied and increased;

(5) That Section 5538 violates Section 30 of Article 2 of the Constitution of the State, which provides that no person shall be deprived of property without due process of law;

(6) That Section 5538 is in contravention of Section 1 of the 14th Amendment of the Constitu-

tion of the United States, which provides that no citizen shall be deprived of his property without due process of law.

(Transcript p. 15.)

It seems that no point is made in this court against the construction which the Supreme Court of Missouri gave to Section 5538, so far as the opinion relates to the Constitution of Missouri. Plaintiffs therefore are compelled to bottom their contention here upon the one averment in their amended bill—that Section 5538 is in contravention of Section 1 of the 14th Amendment to the Constitution of the United States, which provides **that no citizen shall be deprived of his property without due process of law.** They have attempted, however, to enlarge the issues here by urging in their assignment of errors, Numbers 1, 3 and 4, the consideration of other clauses and sections of the Federal Constitution. In these last-named assignments of errors they contend that the Supreme Court of Missouri erred in not holding that Section 5538 supra was in contravention of:

(a) Section 10 of Article 1 of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts. (Plaintiffs' brief p. 16.)

(b) Section 1 of Article 14 of the Amendments to the Constitution of the United States, prohibiting any State from making or enforcing any law abridging the privileges and immunities of citizens of the United States, and prohibiting any State from denying to any person within its jurisdiction the equal protection of the law. (Plaintiffs' brief p. 17.)

(c) Article 5 of the Amendments to the Consti-

tution of the United States, which provides that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without compensation. (Plaintiffs' brief p. 17.)

Neither of these questions was presented to the trial court of Missouri (transcript p. 15). No complaint was made in plaintiffs' amended bill that Section 5538 of the Missouri statute was in contravention of Section 10 of Article 1 of the Constitution of the United States. No complaint was made that Section 5538 of the Missouri statute of 1909 was in contravention of Article 5 of the Amendments to the Constitution of the United States. No complaint was made that Section 5538 of the Missouri Statute was in contravention of Section 1 of Article 14 of the Amendments to the Federal Constitution, prohibiting any State from making or enforcing any law abridging the privileges or immunities of citizens of the Nnited States, and prohibiting any State from denying to any person within its jurisdiction the equal protection of the law.

The first time these questions are heard of in the record or transcript is after the Supreme Court of Missouri has decided the case and handed down its opinion in Division No. 1. They then filed a motion to transfer the case to the court en banc. (Trans. p. 30.) In that motion to transfer from Division No. 1 to court en banc appears these new grounds or new contentions, neither of which was passed upon by the trial court of Missouri or the Supreme Court of that State.

Our contention is that this court will not permit a party to try his case upon one theory in the trial court of the State and in the appellate court of that State and, if unsuccessful in those tribunals, permit him to

spring a fresh theory or a new cause in this court. This precise question came before this court in the early history of the court, and was carefully considered many years ago. Chief Justice Taney, after reviewing all that had been written by this court on this subject, said:

> "When the subject was again brought before it (the Supreme Court) in the case of Crowell vs. Randol, 10 Pet. 368, it determined to give the subject a careful and deliberate examination, in order to remove any doubt which might have arisen from previous decisions. Accordingly, all preceding cases are reviewed and commented on in the opinion delivered by the court in that case, and the doctrine clearly announced, that, in order to give jurisdiction to this court, it must appear **by the record** that one of the questions stated in the 25th Section of the Act of 1789 did arise and was decided in the state court; and that it was not sufficient that it might have arisen or been applicable—it must appear that it did arise and was applied. The rule has been uniformly adhered to since the decision of that case. We think it is the true one, and the only one, consistent with the spirit and language of the section referred to, which so carefully and plainly limits the authority which it confers upon this court over the judgments of state tribunals. * * * * So in the case before us **the clause in the Constitution** and the law of Congress **should have been specified by the plaintiffs in error in the state court,** in order that this court might see what was the right claimed by them and whether it was denied to them by the decision of the state court."

Maxwell vs. Newbold, 59 U. S. 18, How. 511; 15 L. Ed. 506, l. c. 508.

The question was again examined by this court in the case of Sayward vs. Denny, 158 U. S. 180, 39 L. Ed. 941. It was stated in that case, the Chief Justice delivering the opinion of the court, that "the title, right, privilege or immunity **must be specially set up and claimed** at the proper time and in the proper way", and that "**the right on which the party relies must have been called to the attention of the court**, in some proper way, and the decision of the court must have been against the right claimed".

The question was again reviewed by Mr. Justice Harlan, speaking for the court, in the case of F. G. Oxley Stave Company vs. Butler County, 166 U. S. 649, l. c. 653; 41 L. Ed. 1149; and still more recently in the memorandum decision in the case of Cleveland & Pittsburg Railroad Company vs. City of Cleveland, No. 95, decided November 16th, 1914, and found in the advance sheets of the Lawyers' Co-Operative Publishing Company, December 15th, 1914, No. 2, p. 21, where Justice Day, speaking for this court, said:

> "In order to bring a case here, under Section 237 of the judicial code (36 statute at large, 1156, Chapt. 231 U. S. Compt. Stat. Supp. 1911, p. 237), it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court **cannot be enlarged by assignment of error** made to bring the case to this court. This proposition is too well settled to need discussion" (citing a large number of cases).

It was also said in the same case that "a mere certificate of this character cannot bring an additional question into the record, where the record does not oth-

erwise show it to exist. Martin vs. Trout, 199 U. S. 212; 50 L. Ed. 157".

The points made in these three assignment of errors nowhere appear in the record proper of this case. The Supreme Court of Missouri never passed upon either of these questions. They seem never to have been in the plaintiffs' mind until after the opinion of the Supreme Court had been delivered. It was then too late to raise the question. (Opinion of the Supreme Court of Missouri, transcript p. 22.) Under such circumstances this court has declined to consider such question.

Pim vs. St. Louis, 165 U. S. 273; 41 L. Ed. 714.
Fullerton vs. State of Texas, 196 U. S. 192; 49 L. Ed. 443.

But should this court hold that plaintiffs in error are not precluded from raising the three questions here presented for the first time, we submit:

(1) That Section 5538 of the Revised Statutes of Missouri, 1909, does not impair the obligation of any "contract" existing between the State of Missouri and these plaintiffs in error, within the meaning of the Federal Constitution. Plaintiffs in error have failed to recognize the fundamental and cardinal difference in the principles governing the incorporation of private and public corporations and the power of the Legislature to amend and change the charters or articles of incorporation.

(a) There is no "contract" between the State and the individual with respect to the **taxing power of the State.** The imposition of a tax or an assessment is a governmental act to which the contract clause of the Federal Constitution has no application;

(b) The creation of a public corporation by

the State creates no contract between the State and the corporation; nor between the State and the individual members of the corporation; nor between the members themselves. A contract, within the meaning of this section of the Federal Constitution, is one based on mutual assent and consideration;

(c) Nor can it be said that a legislative act changing or altering the charter of a public corporation is an impairment of a contract either as to the corporation or its constituent members.

These propositions are fully supported by the authorities cited in our brief under point X.

The recent case of Hunter vs. Pittsburg, 207 U. S. 161, 52 L. Ed. 151, l. c. 158, so clearly and directly decides all of these questions that we quote somewhat at length from that opinion:

"Briefly stated, the assertion in the second assignment of error is that the Act of Assembly impairs the obligation of a contract existing between the city of Allegheny and the plaintiffs in error, that the latter are to be taxed only for the governmental purposes of that city, and that the legislative attempt to subject them to the taxes of the enlarged city violates Article 1, Section 9, Paragraph 10 of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the State, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that cor-

poration, and shall not be taxed for the uses of any like corporations with which it may be consolidated. It is not said that the city of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

"Briefly stated, the assertion in the fourth assignment of error is that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. * * * This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. (Here follows a long list of authorities.) It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, and to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose

of executing these powers properly and efficiently, they usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of powers conferred upon these corporations, and the territory over which they shall be exercised, rests in the absolute discretion of the State. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State wihin the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is noth-

ing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

There is no denying that drainage districts in Missouri are purely public corporations. They are specifically incorporated as such, and the Supreme Court of that State has repeatedly so held. Section 5499 R. S. Mo. 1909; Little River D. D. vs. R. R., 236 Mo. 94; State ex rel. vs. Taylor, 224 Mo., l. c. 468-9; Land and Stock Co. vs. Miller, 170 Mo. 240.

Their powers and acts must, therefore, be considered and viewed in the light of the law applicable to public corporations. Since the State, in the exercise of its **taxing power**, entered into no contract with its citizens, and since the creation, abolition or alteration of the charter of public corporations by the State are acts not within the purview of that provision of the statute which prohibits a State from passing a law impairing the obligations, this objection urged by plaintiffs against the constitutionality of Section 5538 is without merit. The incorporation of The Little River Drainage District created no contract, expressed or implied, with these plaintiffs in error; and the alteration of the laws under which it was organized, to wit: the enactment of Section 5538 of the Revised Statutes of Missouri, 1909, impaired no contract, for there was none to be impaired.

Moreover, it must be remembered that before The Little River Drainage District could be organized as a public corporation of the State of Missouri the individuals owning the lands within the proposed territorial district were before the court.

Plaintiffs in their petition (transcript pp. 11 and

12) aver that there were more lands of The Little River Drainage District situated in New Madrid County, Missouri, than were in any other of the seven counties in the southeast portion of the State forming a part of The Little River Drainage District. They further charge that the proceedings had in the circuit court of New Madrid County, Missouri, looking to the organization of The Little River Drainage District were subsequently changed from New Madrid County to Butler County, Missouri. The petition does not state that these plaintiffs in error appeared before the circuit court of New Madrid County, filed objections to the incorporation of said district in that court, and caused the venue of said proceedings to be changed to the circuit court of Butler County, Missouri; but the courts of Missouri take judicial notice of their own record, and knew such to be the fact. Little River D. D. vs. R. R., 236 Mo. 94; Kochtitzky vs. Houck et al., 203 Mo. 175.

Plaintiffs in error were, therefore, before the circuit court of Butler County at the time of the organization of the said district. Section 8252 Laws of Missouri 1905, p. 190 (Sec. 5497 R. S. 1909), provides among other things that the non-signing non-resident owners of real estate should be notified by an order of publication of the filing of the Articles of Association, and that their lands, "fully describing the same, will be affected thereby, and **rendered liable to taxation for the purpose of paying the expenses of organization and making the improvements that may be necessary to affect the drainage of the lands included in said district**". This section of the Missouri statute was intended to fully advise the non-petitioning land owners that their lands, as well as all the other lands in the district, "would be rendered liable to taxation for the purpose of paying the expenses of organization".

These plaintiffs in error were before the circuit

court of Butler County at the time of the organization of The Little River Drainage District. They had, therefore, "their day in court". Due process of law means an opportunity to be heard. The law requires all non-petitioning land owners in the district to be summoned or notified by publication. This was done. Section 8252 Laws of Missouri 1905, p. 190.

These plaintiffs in error were bound to take notice and did take notice that their lands would be rendered liable to taxation for the purpose of paying the expenses of organization. There was no maximum amount fixed for the organization expenses in 1907, but in 1909 the Legislature enacted Section 5538, which limited the power of the Board of Supervisors to levy a tax for expenses of ogranization, not to exceed twenty-five cents per acre. Therefore, these plaintiffs were before the court that organized this district, and the law of Missouri (Section 8252, 1905, p. 190) notified them that their lands were liable to be taxed for the expenses of organization.

Plaintiffs in their amended bill aver and charge that their lands were included in the territorial limits of The Little River Drainage District (transcript p. 11). If they were included in The Little River Drainage District, they were found by the circuit court of Butler County, Missouri, to be wet, swampy lands unfit for cultivation and were in need of reclamation. This was the question which the circuit court of Butler County, under the provision of Section 8252 of the laws of Missouri, 1905, was called upon to determine. It did determine the question and overruled the objections of these plaintiffs in error to the incorporation of the district, as shown by plaintiffs' bill, and adjudged and decreed that plaintiffs' lands should be retained within The Little River Drainage District, and they were

thereby made liable for an assessment to pay the expenses of organization.

From that judgment and decree these plaintiffs never appealed. They are, therefore, bound by that adjudication and cannot now be heard to say that their lands are being assessed for this organization tax without due process of law. It is too late to complain and say that plaintiffs' lands were not in need of reclamation, or that they ought not to be assessed with the payment of any sum for causing them to be surveyed and their exact topography ascertained. Moreover, under the construction placed on the drainage laws of Missouri by the Supreme Court of Missouri, these plaintiffs in error, once having been notified of the pendency of the proceedings for the incorporation of The Little River Drainage District, or having voluntarily entered their appearance in the court of that State having jurisdiction of said drainage proceedings, will be held to have had notice of all subsequent proceedings taken in said court affecting said drainage district. State ex rel. vs. Wilson, 216 Mo. 215, l. c. 283.

Therefore, we contend that the enactment of Section 5538 by the General Assembly of Missouri in 1909 created no new obligation and impaired no contract which these plaintiffs had, either with the State of Missouri or with the corporation—The Little River Drainage District,—and when these lands were included within The Little River Drainage District by the decree of the circuit court of Butler County, Missouri, incorporating said drainage district, said lands were thereby conclusively presumed to be benefited to an extent sufficient to pay their proportionate part of the organization expenses, and for the purposes of having said land surveyed, and this whether said lands should be assessed later with benefits or damaged for the ac-

tual construction work. The legislative act of 1909 (Section 5538) limiting the amount to be assessed for this purpose and determining that said assessment should be upon the acreage was but the fixing of the mode by which an existing right and corresponding duty should be executed.

There was, therefore, no "implied contract" of exemption violated; the duty came into existence when the district did; there was no implied contract of exemption from such obligation by reason of the original statute, and the subsequent statute simply limited the amount of the charge not to exceed the sum of twenty-five cents. The conclusion is inevitable; plaintiffs in error never had a contract with the State or district releiving them from the payment of the expenses of organization and for making of the preliminary surveys, and they cannot, therefore, now be heard to say that Section 5538 violates a contract which never existed.

(2) Plaintiffs in error effect to claim that they have **vested rights** which are infringed by the enactment of Section 5538, but this contention is without reason or authority. Drainage districts in Missouri are created for the purpose of exercising important functions belonging to the **police power** of the State, where the conditions call for such instrumentalities. This was directly held by the Supreme Court of Missouri in the case of Squaw Creek Drainage District No. 1 vs. Turney, 235 Mo. 80. "No one," says the Supreme Court of Missouri, "can have any vested rights which he can claim to be exempt from the lawful exercise of the State of its police power." Finch vs. Granite Co., 187 Mo., l. c. 273.

What vested rights have these plaintiffs in error?

(a) They claim the vested right of an implied contract of exemption, but they have overlooked

the fact that no contract has been created within the meaning of the Federal Constitution.

(b) They overlooked the fact that even though such an implied contract did exist the State of Missouri, in the exercise of its sovereignty, has the inherent and undeniable power to incorporate drainage districts for the advancement of the public health and welfare, and that after their incorporation the Legislature has the absolute power to determine the method of paying not only for the preliminary expenses of organization, but also to pay for the construction works of such district, as to that body seems most just and reasonable.

(3) The power to tax rests upon necessity, and is inherent in every sovereignty. (Simmons vs. The State, 12 Mo. 268; Garrett vs. City of St. Louis, 25 Mo. l. c. 510.)

The legislature of every State possesses that sovereignty and power, whether particularly specified in its Constitution or not. (Glasgow vs. Rowse, 43 Mo. l. c. 489.

The people of Missouri, however, have by their Constitution directly and positively vested the power to tax in the General Assembly of this State; and they have also vested the General Assembly with the power and authority to delegate the right to tax to county and other municipal corporations. (Section 1 of Article 10 of the Constitution.)

Under these fundamental principles the Legislature of this State has established and authorized the establishment of drainage and levee districts, and has vested these districts with the same power and authority to assess and collect taxes, or assessments, for the district on the lands within the district that the Legislature itself possessed. This was true in the establish-

ment and in the organization of the Egyptian Levee District under the laws of 1855, heretofore discussed under a previous paragraph of this argument. Egyptian Levee Company vs. Hardin, 27 Mo. 595.)

In 1859 the Legislature organized certain lands situated in St. Louis County into a drainage district and authorized the owners of the land in the district to organize themselves into a board of directors. The board of directors were vested with the power to levy, assess and collect from the owners of the land an annual assessment not to exceed $2.00 per acre on each acre of land within the district. The board of supervisors in March, 1861, made a level assessment of $2.00 on each acre of land within the district. A Mr. Meier who owned lands within the district refused to pay this special assessment of $2.00 per acre. The Levee Company brought suit against him. He resisted the suit and assigned as a reason therefor that the act of the Legislature was unconstitutional and void. The case reached the Supreme Court of Missouri in 1866 and is reported in 39 Mo. 53. The contention of the appellants in the case at bar is so similar in many respects with Meier's contention that we feel warranted in quoting at some length from the opinion:

> "There can be no question now as to the power of the Legislature to create such a company, and to invest it with all the necessary power and authority to construct whatever works may be necessary to accomplish the object intended, and to raise the funds to pay for the same by assessments on the lands to be benefited thereby. This question was fully discussed and determined in the case of Egyptian Levee Co. vs. Hardin, 27 Mo. 495.
>
> "The appellant here (defendant below) in-

sists that he was not a member of the company and cannot be held liable to its assessments unless he had expressly given his assent to the exercise of such a power by an acceptance of the charter. The power of the Legislature to delegate the authority to this company to levy a tax or assessment for the purposes indicated being settled, it follows necessarily that his assent or dissent is a matter of no consequence. The act is evidently based upon the idea that it is a work of sufficient public utility to require its execution and to justify the incorporation of a company with the powers granted by it. The power to levy an assessment upon the lands in question is not to be understood as a power to tax in the ordinary meaning of that term. It is the power to compel the payment of a sum limited by the terms of the law as a compensation for a direct benefit conferred.

"Suppose that the State itself had undertaken to do this work. Will it be pretended that there is no power to compel the owners of the land to pay a tax sufficient to compensate for the actual amount of benefit received by them? If the State can do it, certainly it can delegate the power to a company to do the same thing.

"Upon the idea, then, that there was a public necessity for this work—and the Legislature must be the judge of that matter,—and that it would result in direct benefit to the lands designated by the act, there can be no hardship upon individuals when the rate of assessment is equal and the terms are fixed by which they can have a voice in controlling the affairs of the company. The work to be constructed and the gen-

> eral management and control of all matters pertaining to the business of this company must of necessity be left to the board of directors." (39 Mo. l. c. 57 and 58.)

In 1879 the Legislature passed a general law in conformity with Constitution of 1875 authorizing the land owners, owning wet, swampy and overflowed lands, to incorporate said lands into a drainage district. That statute further provided that when the district was incorporated and organized its board of supervisors was authorized to levy a flat or level tax, annually, of fifty cents per acre on each and every acre of land in the district. (Laws 1879, p. 133.)

Under this statute the land owners of Holt County organized Squaw Creek District No. 1. Messrs. Miller and Davis owned lands within the district and resisted the incorporation of the district. Various reasons were assigned by them for opposing the incorporation of the district; but chiefly because the act of the Legislature violated certain provisions of the Constitution and especially the very provision of the Constitution which the plaintiffs in error in this case urge. The case reached the Supreme Court of Missouri in 1902 and is reported in the 170 Mo. at 240. The opinion discusses most of the question heretofore discussed, and reviews the validity and the constitutionality of the reclamation or drainage laws of Missouri and other States. It directly and positively asserts that

> "It is competent for the State to raise up a governmental agency for the enforcement of its police powers, and for the purpose of enhancing its revenues and carrying its revenue laws into effect. The agency thus created is an arm of the State, a political subdivision of the State, and exercises prescribed functions of govern-

ment, and is not a private corporation in any sense." (l. c. 253.)

The analogy between irrigation, levee and drainage laws is clearly set forth in the following language:

"Levees keep out the water. Irrigation canals bring the water. Drains take out the water. The public has an interest in each kind of such laws. By keeping out the water, the health of the inhabitants is conserved and the value of the lands increased, and the revenues. of the State enhanced. Thus the State is directly interested both for sanitary and financial reasons.

"The irrigation laws bring in the water and make valuable the arid lands, and thereby enhance their value, and hence bring in more revenue to the State. Thus the State has a direct pecuniary interest, although not a sanitray interest.

"The principles underlying the cases upholding the validity and constitutionality of levee and irrigation laws apply with even greater force to drainage laws. For, from a sanitary point of view, the dangers to health arising from overflows occasioned by floods are intermittent, while the dangers to health arising from marshes and stagnant pools of water are continuous and ever present. There is certainly as much, if not greater, reason and necessity for drainage laws as there is for levee and irrigation laws. Drainage laws are closely akin to sewer laws. In fact, the only difference between the two is that they are called sewers in cities and closely-populated communities, while they are called drains in rural and agricultural communities, and the further difference that

sewers are generally covered over to prevent the escape and dissemination of foul odors and noxious gases and conceal the passage of their contents through the streets, while drains are open. There is, however, no difference in the legal principles applicable to the two. If one is constitutional, so is the other. If private property that is benefited by a sewer can be charged for the benefits it receives against the wishes of the owner, so also can the agricultural lands be charged for the benefits conferred upon them. The constitutionality and validity of sewer laws has been uniformly upheld. (St. Louis vs. Oeters, 36 Mo. 456; Kansas City vs. Ridenour, 84 Mo. 253; St. Joseph vs. Owen, 110 Mo. 445; Heman vs. Allen, 156 Mo. 534; Heman vs. Schulte, 166 Mo. 409.)

"So likewise the validity and constitutionality of reclamation or drainage laws has been upheld by the courts. (Hagar vs. Reclamation District, 111 U. S. 701; Head vs. Amoskeag Mfg. Co., 113 U. S. 9; Rutherford vs. Maynes, 97 Pa. St. 78; Comrs. of Highways vs. Drainage Comrs., 127 Ill. 581; Riebling vs. People, 145 Ill. 120; Kinyon vs. Duchene, 21 Mich. 498; Sessions vs. Crunkilton, 20 Ohio St. 349; Tidewater Company vs. Coster, 18 N. J. Eq. 518.)" (170 l. c. 251-2.)

In the further discussion of that case and the statute authorizing the formation of drainage districts, it was said:

"These considerations impel the conclusion that the drainage laws of this State are constitutional; and that the corporations organized thereunder to carry them into effect are public,

governmental agencies and in no sense private corporations, and that the benefits assessed are legal.

"The fact that the unwilling citizen is affected by the law and drawn into the corporation against his will does not affect the constitutionality of the law. The same is true of every law. Many persons object to many laws, and are drawn within the pale of the law against their will; but this does not affect the constitutionality or validity of the law. So likewise laws authorizing the formation of cities, towns, townships and school districts draw unwilling persons into such association for governmental purposes, and entail taxes and special burdens, and individual restraints that were not before imposed. But such results must follow from all laws and all governments. The welfare of the State, the health of the people of the State or of a particular locality of the State, is a matter of governmental concern, and the fact that there are those who are unwilling to become a part of a governmental division of the State, and unwilling to bear the burdens of government, even where they result in personal benefit to them, does not affect the validity of the law.

"It only remains to say that the right of trial by jury as guaranteed by the Constitution is in no manner impaired by the laws under consideration. No right of trial by jury existed in such cases at common law or was ever accorded by any constitution of this State. Nor is it true that the defendants are deprived of their property without due process of law. Before their property is brought within the benefit district or drainage district all owners of property are

given a day in court. The fact that this case is here is conclusive evidence the defendants are enjoying all the benefits of due process of law, for they are contesting the power of the State to assess their property even before any work of drainage has been done.

"The fact that each owner is entitled to one vote for every acre of land owned by him creates no more infirmity in the law than the right of each stockholder of any corporation to cast as many votes as he owns shares of stock renders such laws invalid. In both instances the majority in interest instead of the majority in number controls, and who shall say such laws are not just?" (Land & Stock Co. vs. Miller, 170 Mo. l. c. 258-259.)

In 1905 the drainage statute of 1879 was amended and enlarged. Soon after the passage of the act of 1905 it was contended in the case of State ex rel. vs. Drainage District, 192 Mo. 517, that corporations authorized under that act were private corporations and not public corporations. On this precise question the Supreme Court of Missouri said:

"This contention is untenable. In Morrison vs. Morey, 146 Mo. l. c. 560, and in Land & Stock Co. vs. Miller, 170 Mo. l. c. 253 and 258, a like contention was held untenable, and drainage corporations were held to be public, governmental agencies, and in no sense private corporations. The conclusions they reached are emphasized both by Section 8253, Revised Statutes 1899, and by Section 8253 of the Act of 1905, both of which declare that the judgment of the circuit court shall duly declare and decree said

drainage district 'a public corporation of this State'.

"Thus such corporations have been declared to be public corporations, both by this court and by the express declaration of the acts under which they are authorized to be formed and to exist." (State ex rel. vs. Drainage District, 192 Mo. 520.)

The constitutionality of the drainage statutes of Missouri and the rights of the drainage districts as public corporations of the State, and under what power of the government the drainage district was authorized, was recently discussed in an able opinion in the case of The Little River Drainage District vs. the Railroad, 236 Mo. 94. It is there said:

"Neither is it necessary that the drainage law should recite the public benefits to be effected and upon which the validity of the law must rest. In the case of Morrison vs. Morey, 146 Mo. loc. cit. 563, 48 S. W. 634, this court said: 'We take judicial notice of the fact that overflows are followed by disease, resultant from the decaying deposits left by the water, and that such disease is not and cannot be confined to a single family, but spreads among the people of the locality without any fault of theirs, and which they are powerless to prevent.' So will this court take judicial notice of the fact that the swamp and overflowed lands sought to be drained by this proceeding were granted to this State by act of Congress, September 28, 1850, to enable the State 'to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for

cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said State', and that the next General Assembly of this State (Session Acts 1850-1851, p. 232) passed an act appointing a board of commissioners for the purpose of having these lands surveyed and 'to devise some safe, expedient, economical and practicable plan for the reclamation of said lands from their present wet condition and liability to overflow, and for rendering the same tillable and fit for cultivation'.

"The power of the State to provide by legislation for the reclamation of said lands was thus recognized in the provisions of the act through which the State secured its title thereto, and by the Legislature of this State by he law enacted in accordance with the purpose for which the lands were granted.

"The right of the State, in the exercise of **its police power**, to drain lands for the purpose of protecting the health of the people is generally conceded, and if such power may be invoked to protect the health of the people inhabiting swamp and overflowed lands, it may also be invoked to make such lands fit for use, productive and habitable., and so the courts have held. Mound City Land & Stock Company vs. Miller, supra, 170 Mo. loc. cit. 258, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; Hagar vs. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; C. B. & Q. Ry. Co. vs. Drainage Commissioners, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed.

596; State ex rel. vs. Board of County Commissioners, 87 Minn. loc. cit. 336, 92 N. W. 216, 60 L. R. A. 161; Irrigation District vs. Williams, 76 Cal. loc. cit. 367, 18 Pac. 379." (139 S. W. l. c. 334.)

The Legislature of Missouri in the case at bar exercised its legitimate prerogative, and determined the amount of the tax that was necessary to secure the preliminary information essential to an intelligent understanding of the physical conditions of the district incorporated before entering upon the work of construction. It apportioned this tax upon every acre of the land in the district that **had been adjudged to need reclamation.** The apportionment of this tax is uniform and affects each acre of land exactly alike, and is free from discrimination and injustice.

(4) Counsel for plaintiffs in error in their brief have confused the **taxing power of the State** with the power of **eminent domain.** We do not for one moment deny that "due process of law" includes the idea of compensation for property taken for public use under the power of eminent domain; but that question is not before this court, and the citations in plaintiffs' brief in support of this claim were cases involving the power of eminent domain. The precise question here is whether or not Section 5538 violates Section 1 of the 14th Amendment to the Federal Constitution, which provides that no citizen shall be deprived of his property without due process of law. Judge Cooley, in his work on taxation, notes the distinction between governmental powers relating to taxation and eminent domain, with exact clearness:

> "If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the

assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear. 'Taxation exacts money or service from individuals as and for their respective shares of contributions to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount of value exacted from any other individual or class of individuals.' '' (Cooley on Taxation, p. 430.)

Section 5538 of the Missouri statute deals alone with taxation, and not with eminent domain. This conceded, the next question is, does said section deal with general taxes or special assessments for local benefits? If the latter, does it violate Section 1 of Article 14 of the Federal Constitution in that the section and the enforcement of it deprives the plaintiffs in error of their property without due process of law? It must be conceded that the right to impose and apportion taxes belongs exclusively to the legislative department of the government.

Plaintiffs in error concede that if ths court holds there was a legislative finding of special benefits upon the lands included in The Little River Drainage District, then Section 5538 does not violate the Constitution, and the holding of this court will be against them. They argue, however, that such a legislative finding "is palpably false", and rely upon the case of Norwood vs. Baker, 172 U. S. 269. They overlooked the fact that the case of Norwood vs. Baker was reviewed by this court and its application limited to the facts stated in that case by this court in the case of Barber Asphalt Paving Company vs. French, 181 U. S. 324. This court, in the French case, limited the principle announced in the Norwood case to the specific facts which arose in the latter case, and refused to recede from the position previously taken by this court with reference to the power of the Legislature to establish local municipalities to aid in the development of the States and in protecting the citizens of the States in their health and property.

The Supreme Court of Missouri, in the case of Barber Asphalt Paving Company vs. French, 158 Missouri 534, reviewed the holdings of the Supreme Court of Missouri upon this question, and then pointed out with great care the precise question of fact that controlled the majority of this court in the Norwood case. When the French case reached this court the majority of the opinion of the court indorsed the distinction made by the Supreme Court of Missouri, and supported it by citing a long line of carefully-adjudicated cases, and especially the cases of Spencer vs. Merchant and Davidson vs. New Orleans.

"It is quite true," says the Supreme Court of New York, "that the right to impose such special taxes is based upon a presumed equivalent, but it by no means

follows that it must be in fact so full and equivalent in every instance, or that its absence will render the assessment invalid." (11 Johns 77.)

In the case of Ludlow vs. Cincinnati, S. R. Company, 78 Kentucky 357, the Court of Appeals of Kentucky said:

> "While assessments of this character," (local or district assessments) "as distinguished from general taxation, rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefit to the owner shall be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement and of the question of benefits to the owners of abutting property."

In his work on taxation, 3rd Edition, Volume 2, p. 1208, Judge Cooley says:

> "It has been repeatedly decided that the legislative act of assessing districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive."

The foregoing authorities were approved in the case of Northern Pac. R. Co. vs. Seattle, reported in the 12 L. R. A. (N. S.) 121.

In the comparatively late case of L. & N. R. R. vs.

Barber Asphalt Paving Co., 197 U. S. 430, Mr. Justice Holmes, in discussing the principle here involved, among other things, said:

> "The amounts of benefit which an improvement will confer upon particular lands—indeed whether it is benefited at all—is a matter of forecast and estimate. In its general aspect, at least, it is peculiarly a thing to be decided by those who make the law."

In the case of Wight vs. Davidson, 181 U. S. 371, 45 L. Ed. 900, l. c. 905, this same principle was involved, and the court said:

> "* * * by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water-mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley in which a water-main shall be laid, such act must be deemed conclusive alike of the question of necessity of the work and of the benefits as against abutting property."

Our investigation has failed to disclose but one case in the United States where a flat or level drainage tax or assessment levied to pay preliminary expenses was contested. In that instance the tax was levied to pay for making surveys, maps, etc. (as was done in the case at bar). After these expenses were incurred it was found that none of the lands in the district would be benefited. Nevertheless, the court held the assessment a valid one and enforced its collection.

Among other things, the court said:

"The essential complaint is only that the proceedings for the purpose of raising money to pay the preliminary expenses of the proposed improvement which failed were illegal, and that its lands should not be taxed, because it had been determined that they would not have been benefited by the improvement if it had been carried out. It is possible that an investigation to determine the benefits flowing from a proposed improvement might develop the fact that none of the lands in the district would be benefited by the improvement. In such cases every owner could put forth the same objection to the payment of his share of the preliminary expenses as does the appellant here, and for the same reason. The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were necessarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated—a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement. So that, no objection having been made by the appellant, at any stage of the proceedings, to the formation of the district and the inclusion of its lands in said district, nor to the petition and proceedings under which the decree determined the amount of the indebtedness of the district, the right of appeal from all of such proceedings

existing, it is estopped to object to anything but the constitutionality of the law under which the assessment is sought to be made and the tax collected, for it seems plain that the provisions of the law have been complied with." Northern Pacific R. R. Co. vs. Pierce County, 51 Wash. 12, 23 L. R. A. (N. S.) 288-9.

So here these plaintiffs in error had their day in court and were before the court and filed objections to the incorporation of the drainage district, and then caused the venue to be changed from New Madrid County to Butler County, and when at last the district was organized they prosecuted no appeal from that judgment, as did the railroad, and they are therefore bound by it.

But our further contention is that the Legislature may, by its own act, fix the territorial limits of special assessment districts, and by its own act determine the amount of the assessment per acre, as was done in the case of Egyptian Levee Company vs. Hardin, 27 Mo. 495, and in the case of Columbia Bottom Levee Company vs. Meier, 39 Mo. 53, l. c. 57, and as announced in the case of Spencer vs. Merchant, and in the case of French vs. Barber Asphalt Paving Company; or the Legislature had a right to delegate to some agency of the State the power to create these special assessment districts, as was announced in the case of Land & Stock Company vs. Miller, 170 Mo. 240, l. c. 251-2-3, and in the case of Webster vs. City of Fargo, 181 U. S. 394, 45 L. Ed. 916, and in the case of Hagar vs. Reclamation District, 111 U. S. 701.

We further contend that it was within the power of the Legislature to charge the property within the special assessment district with a level rate for the purpose of paying the organization expenses and for mak-

ing the topographical surveys upon the area rule, as was done in the case of Egyptian Levee Company vs. Hardin, 27 Mo. 495, and the case of Columbia Bottom Levee Company vs. Meier; and to apportion the cost of making the permanent ditches and levees according to the benefits that each acre of land in the territory would receive. In either event, the Legislature of Missouri acted within constitutional limits, as was announced by this court in the case of Spencer vs. Merchant, and re-affirmed in the case of French vs. Barber Asphalt Paving Company, and in the case of Webster vs. City of Fargo.

We further contend that the Legislature of Missouri could authorize the levy of this special assessment of twenty-five cents per acre upon every acre of land within the territorial limits of the district, for the purpose of defraying the organization expenses and for making the topographical surveys, without further inquiry as to the value or benefit the property assessed would receive, other than the notice that was given to all non-petitioning land owners in the district at the time of the organization of the district, and that the enforcement of this special assessment is not a taking of private property without due process of law, under the Federal Constitution. The cases of Hagar vs. Reclamation District and Spencer vs. Merchant and French vs. Barber Asphalt Paving Company will serve as authorities for this proposition.

Moreover, we contend that a legislative finding of benefits will **be presumed after an assessment has been authorized.** Both court and Legislature take notice of the topography of the State, and that wet, swampy lands subject to overflow, will be rendered more habitable and productive, and that the public health will be greatly benefited by removing the water, which causes

the unhealthy conditions. N. P. R. R. Co. vs. Seattle, 12 L. R. A. (N. S.) 121; Little River D. D. vs. Railroad, 236 Mo. 94; Mound City Land & Stock Co. vs. Miller, 170 Mo. 240; C. B. & Q. R. R. vs. Drainage Com., 200 U. S. 561; Hagar vs. Reclamation District, 111 U. S. 701; N. P. R. R. Co. vs. Pierce Co., 23 L. R. A. (N. S.) 286.

The act of the Legislature in levying an assessment for a definite sum against each lot of land for special improvements is conclusive alike of the necessity of the work and of its benefits to the property assessed, and the Legislature, in so doing, is not compelled to give notice to the parties resident within the district, or to give a hearing before itself or one of its committees or any other tribunal, as to the question of whether the property so included within the district is in fact benefited. Hagar vs. Reclamation District, 111 U. S. 701; Parsons vs. District of Columbia, 170 U. S. 45; Chadwick vs. Kelly, 187 U. S. 540; Cooley on Taxation, 2nd Ed., p. 149.

For these reasons, among others which are urged in our brief, we respectfully submit that the judgment of the Supreme Court of Missouri in this case ought to be affirmed.

Respectfully submitted,

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Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 35.

LOUIS HOUCK AND MARY H. G. HOUCK, HIS WIFE; CHARLES J. JUDEN AND C. G. COX, PLAINTIFFS IN ERROR,

vs.

THE LITTLE RIVER DRAINAGE DISTRICT, JOHN H. HIMMELBERGER, ET AL., DEFENDANTS IN ERROR.

APPENDIX TO BRIEF OF DEFENDANTS IN ERROR.

ROBERT BURETT OLIVER, JR.,
ROBERT BURETT OLIVER,
ALLEN LAWS OLIVER,
Attorneys for Defendants in Error.

(23,960)

No. 14834.

COUNTY OF MIAMI ET AL.

vs.

CITY OF DAYTON ET AL.

Decided by Supreme Court of Ohio, June 4, 1915.

No. 14834. The County of Miami *et al. vs.* The City of Dayton *et al.* Error to the Court of Appeals of Montgomery County.

No. 14829. The State *ex rel.* Robert P. Duncan, prosecuting attorney, *vs.* The Franklin County Conservancy District. Error to the Court of Appeals of Franklin County.

WANAMAKER, *J.*:

1. A statute that provides a rule of practice, a course of procedure, or a method of review is remedial in its nature and should be broadly and liberally construed to accomplish the purpose of its enactment.

2. Section 12247, General Code, is remedial in nature and is sufficiently broad and comprehensive under section 6, article IV, of the constitution of 1912 to include the case at bar.

3. The conservancy act, as found in volume 104, C. L., 13 *et seq.*, which is entitled "An act to prevent floods, to protect cities, villages, farms, and highways from inundation, and to authorize the organization of drainage and conservation districts," is a valid exercise of the police power under the inherent sovereign legislative power of the State, and particularly under the conservancy amendment of the Ohio constitution, known as article LI, section 36, as adopted September, 1912.

4. Said act contains abundant provisions which grant not only to the parties to the cause, but to any one who may desire to become a complainant or objector, his "day in court," and by reason thereof said act does not violate the "due process" clause of the Federal Constitution. This includes the three-tenths-mill levy of the act.

5. While the letter of the act uses the word "tax" in a general sense, the whole act, its spirit, its subject-matter and its actual operation, taken together, make it manifest that the word "tax" as therein used is special and local and what is known under the laws of Ohio as an "assessment."

6. Taking the act by its four corners and its practical operation, it is self-evident that such assessment is to be made with reference to benefits and burdens and not according to any whimsical, arbitrary or unreasonable standards, and by reason thereof it does not violate the provision of the Federal Constitution as to "equal protection of the laws."

7. Before a court is warranted in declaring a legislative act unconstitutional it must clearly appear that the statute is obviously repugnant and irreconcilable with some specific provision or provisions of the Constitution. If there be a reasonable doubt as to such conflict the statute must be upheld.

8. The doctrine of home rule does not now, and never did, have any application to the governmental affairs of a State or the governmental affairs of a district within the State created by the State for the exercise of certain State sovereign powers.

9. Where a power is quasi-legislative, quasi-administrative, or quasi-judicial, or so mixed in its nature that it may be regarded as a combination of all of them, the legislature may, in the first instance, characterize such power and confer it either upon an existing agency of the Government or an agency especially created for that purpose. There is no delegation of legislative power in the conservancy act violative of any constitutional provision.

10. An act of the general assembly purposing to be an emergency act but which failed to receive the two-thirds majority in our branch of the general assembly, as required by the constitution for an emergency act, becomes at the end of the ninety-day referendum period a valid act of the general assenbly if otherwise constitutional.

11. The judgment of the general assembly as to the emergency character of an act under the constitutional amendment of 1912 is not conclusive, but its judgment in that behalf may be challenged in a proper proceeding at any time within the ninety-day period, either as to the constitutional vote or the emergency character of the act.

(Nos. 14834 and 14829. Decided June 4, 1915.)

Opinion.

WANAMAKER, *J.*:

We have in this case almost every variety of legal and constitutional question. Indeed the record and briefs are so voluminous in the treatment of the issues raised that it will be impossible, outside of a volume, to note and discuss them all. Those meriting serious attention will be noted below.

I.

THE QUESTION AS TO THE JURISDICTION OF THE COURT OF APPEALS TO ENTERTAIN THE PROCEEDINGS IN ERROR FROM THE COURT OF COMMON PLEAS.

This court has already held in *Snyder et al. vs. Deeds et al.*, decided in December, 1914, that "that portion of the 6th section of the conservancy act which provided for appeal from an order refusing to establish such district to the court of appeals of said county upon giving bond as provided therein is void because repugnant to section 6, article IV, of the constitution." It is now claimed that by

reason of such holding as to "appeal" there is no authority of law, either by statute or constitution, conferring jurisdiction "in error" upon the court of appeals. This court has repeatedly held that proceedings in error are fairly and reasonably included in the term "appellate jurisdiction" and it will be therefore necessary to examine the constitution with reference to the appellate jurisdiction conferred therein upon the court of appeals.

Section 6, article IV, of the constitution of 1912 contains the following language as to the jurisdiction of the court of appeals:

> "The courts of appeals shall have original jurisdiction in *quo warranto*, mandamus, *habeas corpus*, prohibition, and *procedendo*, AND APPELLATE JURISDICTION IN THE TRIAL OF CHANCERY CASES, AND TO REVIEW, AFFIRM, MODIFY, OR REVERSE THE JUDGMENTS OF THE COURTS OF COMMON PLEAS, SUPERIOR COURTS AND OTHER COURTS OF RECORD WITHIN THE DISTRICT AS MAY BE PROVIDED BY LAW."

That this proceeding in error was to reverse a judgment of court of common pleas there can be no doubt. The mere fact that it was constituted of more than one common pleas judge does not alter the fact that it was to all intents and purposes a court of common pleas. The only question to be determined here is as to whether or not there was any provision "by law" for this proceeding in error.

It seems to be agreed upon both sides that whatever authority has been provided "by law" is by virtue of section 12247, General Code, which reads as follows:

> "A judgment rendered or final order made by a court of common pleas or by the superior court of Cincinnati, or by a judge of either of such courts, may be reversed, vacated, or modified, by the court of appeals having jurisdiction in the county wherein the common pleas or superior court is located, for errors appearing on the record."

The right to have the same referred to the people for judgment had been lost, and it was too late thereafter to attack the emergency character of that act, either as to the vote thereon, or otherwise.

Manifestly, the legislature's judgment in that behalf, as shown by the act itself and the records touching the same, is not conclusive. The people's right to the referendum on any act of the legislature may, in a proper proceeding and at a proper time, be challenged, notwithstanding the action of the general assembly of Ohio, but it is too late after the expiration of the referendum period provided by the constitution.

CONSTITUTIONAL OBJECTIONS INHERENT IN THE ACT.

It is especially urged that the conservancy act takes private property without due process of law; denies the equal protection of the laws; delegates legislative power to the courts; permits the jurisdiction of courts of common pleas to be fixed by the petitions of citizens; that the power of taxation is delegated to directors in violation of section 1, article II, of the constitution; that political subdivisions are created to be governed by directors appointed by the court and not elected by the people, violates various home-rule provisions of the State constitution, and sundry other objections which, so far as they are deemed important, will be noted in the opinion. Both State and Federal courts are uniform in their holding that before a legislative act can be declared unconstitutional, it must be clearly in conflict with some provision of the constitution; it will not do to hold that the act is unconstitutional because it is contrary to a general spirit pervading the constitution, but the conflict must be between the act and some specific provision, either in express words or by clear implication.

Of late many courts, and especially the Federal courts, have held that the conflict must be "beyond a reasonable doubt" and all the courts throughout the States and union

hold that where there is a reasonable doubt as to whether or not there is such conflict that doubt must be resolved in favor of the statute and its validity therefore upheld.

In order then that the conservancy statute, or any part thereof, shall be held unconstitutional it must appear that the statute permits something which the constitution prohibits, or prohibits something which the constitution permits, and that this conflict must be so clear that it is beyond reasonable doubt.

In construing a constitution we apply the same general rules that we do in statute, save and except that the terms of a constitution must of necessity be of a more general and omnibus character, and, therefore, in order that the grants of power under the constitution shall be workable, such grants should be favorably and liberally construed so as to effect the public welfare sought by the constitutional grant.

What is permitted by this statute that is prohibited by the constitution, or what is prohibited by the statute that is permitted by the constitution?

Police power has always been recognized as one of the sovereign attributes of government. It is generally defined as:

> "That inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires (8 Cyc., 863).

The subject of drainage in order to serve the public health, convenience and welfare, has always been regarded as a legitimate exercise of the police power of government. This power has always been peculiarly recognized as a legislative power, inherent in the law-making body, even though there be no express constitutional authority therefor.

An early case refreshing and illuminating upon this

doctrine generally, is that of *Deevs vs. Treasurer of Wood County et al.*, 8 Ohio St., 333, in which a most able opinion is rendered by Judge Brinkerhoff.

But the people of Ohio especially delegated the police powers involved in this case to the legislature in the following language of the constitution of Ohio, as found in article 2, section 36, the par. applying reading as follows:

> "laws may also be passed * * * to provide for the conservation of the natural resources of the State, including streams, lakes, submerged and swamp lands and the development and regulation of water power and THE FORMATION OF DRAINAGE AND CONSERVATION DISTRICTS."

This amendment was adopted September 3, 1912, and reads almost like a prophesy of Jeremiah, as to the terrible floods that visited different portions of the State in March of the following year.

Whether the legislature proceeded under the general police power vested in government, or under the special provision of the constitution, or both, is unimportant. Suffice it to say that it did proceed to enact a conservancy statute, as it has become popularly known, as found in volume 104, O. L., 13, *et seq.*, which is entitled:

> "An act to prevent floods, to protect cities, villages, farms, and highways from inundation, and to authorize the organization of drainage and conservation districts."

It is contended with much vigor and plausibility that the statute is in clear conflict with the fifth and fifteenth amendments of the Federal Constitution, especially that part that denies to any State the right to deprive any person of life, liberty or property "without due process of law," or to deny to any person the "equal protection of the laws."

The "due process" clause has been much abused and stretched to limits never designed by the constitution-makers.

But it must be observed that it is not the deprivation of property that is prohibited by this amendment, but the deprivation of property WITHOUT DUE PROCESS OF LAW. Full provision is made at every stage of the conservancy act, from the time of the filing of the petition to create a conservancy district until the last step is taken for the assertion of any and all rights by any and all parties affected by this act. Every person substantially affected is given a "day in court" from the time of the organization of the district until the proposed improvement is completed. To illustrate:

The petition must set forth:

> "First. The proposed name of said district.
>
> "Second. THE NECESSITY FOR THE PROPOSED WORK AND THAT IT WILL BE CONDUCIVE TO THE PUBLIC HEALTH, SAFETY, CONVENIENCE OR WELFARE.
>
> "Third. The general description of the purpose of the contemplated improvement and the territory to be included in the proposed district. * * * Said territory need not be contiguous, provided it be so situated that the public health, safety, convenience or welfare will be promoted by the organization as a single district of the territory described.
>
> "Fourth. Said petition shall pray for the organization of the district by the name proposed."

In addition to the petitioners and all parties of record, special provision is made by section 6 of the act that:

> "Any owner of real property in said proposed district, who individually may not have signed such a petition and who wished to object to the organization and incorporation of said district shall, on or before the days set for the cause to be heard, file his objection why such district should not be organized and incorporated, etc."

The conservancy act providing what the petition must con-

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allegations of the petition to be true, that is "The necessity

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for the proposed work and that it will be conducive to the public health, safety, convenience or welfare."

Throughout the entire act ample provision is made for any objector to appear, whether he is a party to record or no, either before the court at the time of organization or before the board of directors after the organization, or the board of appraisers, and present his objections, either as to his being within the district, as provided by section 29, which he may do after the district is created, or as to the amount of assessment upon his lands, or as to any other right that he may believe to have been violated, and have the same heard and determined.

In this view of the case it is difficult to seriously point out where and how there has not been accorded to the private citizen, as well as to the public, every substantial consideration of his rights as recognized by the phrase "due process of law."

But it is claimed that he is denied the "equal protection of the laws." Written constitutions were adopted not as a sword against the public interests, but as a shield to protect the public interests, safeguarding the rights of the humblest, as well as the highest citizen, but all the while recognizing that even private property is subservient to the general welfare.

If the "equal protection of the law" must be determined with mathematical nicety and precision, no public improvement, local, State or national, would be possible. Especially would this be true in drainage improvements and projects. One cannot read this law, however, without being impressed with the fact that the legislature had in mind all the while that the improvement should be construed and the cost thereof paid with reference to the burdens and benefits of the improvement.

The mischief and burden legislated against was the surplus waterfall. The creation of a conservancy district by the Court of Common Pleas would certainly raise the presump-

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tion that all lands included within the district would be benefited and that the burden and benefit should receive due consideration in the apportionment of the cost of the improvement, whether relating to the preliminary plans, costs of the construction or the expense of maintenance.

The court in the establishment of the district might well conclude that in the ordinary and natural course of events an acre of land within the watershead twenty miles from the improvement would probably cast as big a burden of rainfall as an acre of land immediately adjoining the improvement, and that taking care of this surplus water, acre for acre throughout the district, would be of substantially equal benefit to the real property of that district.

As evidence that the act contemplates ASSESSMENTS according to BENEFITS, section 12 requires the directors to prepare a plan for the improvement for which the district was created and that such plans, data, etc., shall set forth properly "the location and character of the work and of the property benefited or taken or damaged," etc.

Again in section 27 it is provided that the board of appraisers shall

> "proceed to appraise the benefits of every kind to all real property within or without the district, which will result from the organization of said district and the execution of the official plan."

And again in the same section—

> "The board of appraisers shall also appraise the benefits and damages, if any, accruing to cities, villages, counties, townships and other public corporations," etc.

Again in section 28 as to lands affected outside of the district reference is again made to appraising the benefits and damages to such land.

Section 29 and other sections of the act are to the same general effect.

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Indeed it is quite evident that an unusual opportunity was taken to express the plan of assessments based on benefits and burdens.

Now, the language of the act uses the word "tax," but the word "tax" is a general term, and is used frequently as a general tax, or as a local and special tax, in which latter instance it is more frequently spoken of as an "assessment." Indeed, it has been repeatedly held that the word "tax" is sufficiently general and comprehensive to include the word "assessment." The very fact that personal property is included from bearing the cost of the improvement and that the word "property" is held to mean by the terms of the act to be real property, forces us to the conclusion that it was the intention of the legislature to provide for the cost of the improvement by way of assessment, as in other drainage cases.

Courts will not limit themselves to the form and name of things. It is their duty to probe deep enough to get at the substance and the essence of the thing by whatever name or brand it may be known. The whole spirit of the law and its provisions in connection with its practical operation unmistakably indicates that the legislature used this word "tax" in its local and special sense—in short, as an ASSESSMENT.

Section 43 of the act provides:

> **"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise."**

We have carefully read and examined the contention in the voluminous briefs that this is a general tax levy, and

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that, therefore, it violates numerous provisions of the constitution as to the laying and levying of general taxes. The court of appeals in a very able opinion adopted this view of the case.

Having, however, already found that this is a special and local tax in the nature of an assessment, we believe the better reasoning found in the Federal case, County of Mobile *vs.* Kimble, 102 U. S., 691. In this case the State of Alabama had provided for the improvement of Mobile harbor and had provided for the payment by a levy upon the property of the county of Mobile. Objection was taken that this was either a local improvement for the city of Mobile alone, or else it was a State improvement. In either event, the county of Mobile should not be taxed for the cost of the improvement.

Mr. Justice Field on page 703 uses this language:

> "Here the objection is urged that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particluar subdivisions of the State, or lay the greater share of the whole upon that county or portion of the State specially and immediately benefited by the expenditure."

But a case more in point, indeed on practically all fours with the case at bar, is the recent case of Houck *vs.* Drainage District, decided March 1, 1913, as found in 248 Mo., 373. In the Missouri case, as in the case at bar, a corporation was created for the purpose of reclaiming or improving swamp or overflowed lands. The corporation was vested with power and authority to construct and maintain whatever works were necessary to accomplish the object and to raise the

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A statute undertaking to provide a rule of practice, a course of procedure, or a method of review, is in its very nature and essence a remedial statute. It should not be narrowly and technically construed but upon the contrary should receive a broad and liberal construction to effect the purpose of its enactment. The language of the foregoing statute is as broad and comprehensive as language can well be made and clearly covers all judgment, whether predicated on an ordinary civil action, chancery case, special proceding under a statute, or any other judgment for which no special review provision is made by the statute itself.

But it is claimed that in the conservancy act special provision was made by way of "appeal," and that, the appeal having failed, proceedings in error must now fail. True it is that where special provision is made by the statute for appeal or review, and such special provision is conformable to the constitution, such special provision must be followed as against general provisions, but where these special provisions fail because they fail to conform to the constitution, as they have failed in this case, the general provision, if it be sufficiently comprehensive, will then prevail. The court of appeals rightly and lawfully exercised jurisdiction in this cause under said section of the statute and pursuant to the constitution.

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II.

This conservancy act, as a whole, is challenged as null and void for sundry and divers reasons which may be grouped under two heads:

FIRST. THAT IT FAILED TO HAVE THE CONSTITUTIONAL MAJORITY REQUIRED FOR THE VALID ENACTMENT OF AN EMERGENCY LAW.

SECOND. THAT THE ACT IS IN CONFLICT WITH VARIOUS PROVISIONS OF THE CONSTITUTION OF OHIO AND THE CONSTITUTION OF THE UNITED STATES.

No claim is made that at any stage of the passage of this act it failed to receive a majority vote of each branch of the general assembly sufficient to make it an ordinary law under the old constitution. But it is urged very strenuously that in order to make said act an emergency act, as provided by the constitution, it must clearly and affirmatively appear that the act as a whole received a two-thirds vote upon final passage in both branches of the general assembly and that the special emergency section must also receive a two-thirds majority in each branch of the assembly; that the records in this case unquestionably show that in the house vote upon the concurrence in the senate amendments the bill only received a mere majority vote, and that, therefore said bill failed as an emergency measure, evidently the sole purpose of the constitutional requirement of a two-thirds majority in emergency measures was for the purpose of withdrawing such measures from the referendum provision of the constitution.

It being conceded that this act had a majority vote in both houses, and that no attempt was made to invoke the referendum provisions of the constitution thereon, then at the end of the ninety-day period the same became a valid law as enacted. The time within which a referendum might be invoked, as provided by the constitution had elapsed.

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funds to pay for the same by assessment on the lands to be benefited thereby.

The Missouri statute contained this provision:

> "As soon as any drainage district shall have organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power and authority to levy upon each acre of land as a level rate, to be used for the purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits." etc., "before entering upon the main work of drainage."

The Supreme Court of Missouri held that that section was constitutional as against the contention of "due process of law" and "equal protection of the laws" provided by the Federal Constitution. They also found that it was no violation of the Missouri constitution, which, so far as the matters are involved, is not unlike the constitution of Ohio. This Missouri case is rich in its reason and apparently covers the whole doctrine of police power exercisable by the State in its relation to the creation of districts for drainage or conservation purposes.

Special attention is here noted to the language of the Supreme Court of Missouri touching this statute. The court says touching the flat rate of twenty-five cents per acre upon all lands within the district for preliminary survey, plans of drainage, etc., before entering upon the main work of drainage:

> "The section is constitutional. If it be objected that no judicial finding of benefits is required, it will be answered that the legislature has seen fit to entrust to the judicial department the establishment and territorial limitation of the benefit district in a proceeding in which the question whether or not each tract included will be benefited is directly involved. Having expressed its will as to the principles which should govern the distribution of these taxes

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upon the land so found to be benefited, the legislature has left the necessary amount of the assessments to be ascertained by the authorities of the district, as it leaves like questions of municipal taxation to its municipal agencies."

Again the court further says in its syllabus:

"Again, if it be objected that it *might* be developed by the work, and therefore it must be assumed to have been contemplated by the law, that there will be no resulting increment, which, under the name of benefits, constitutes the only constitutional support for this class of taxation, it will be answered that, when the organization of a drainage district has reached the stage where the tax in question may be levied, the situation is: The legislature has designed an important public work and has found that its accomplishment will result in such benefit to the lands included in its scope as to justify the assessment of the entire cost as a special tax against them. The power to tax necessarily includes the power to raise the money in such time and manner as is necessary to accomplish the purpose for which the tax is levied."

The common pleas court having found in this cause that the allegations of the petition are true and therefore organized the drainage district, it must be presumed that the lands included within such district are benefited so as to justify the assessment as to preliminary plans, surveys, etc., by a flat rate of three-tenths of a mill upon all lands included within such district. No question is seriously made as to the actual cost of any plan hereafter adopted or the expense of its maintenance. The three-tenths mill for preliminary expense is the only question seriously made. We do not believe that such levy made under the exercise of the sovereign police power of the State violates any provision of State or Federal constitution.

Again, it is claimed with much force, that the conservancy statute undertakes to delegate legislative power. It is not specifically pointed out as to just what powers are strictly

and wholly legislative, but it certainly cannot be seriously contended that the powers vested in the court of common pleas pertaining to the creation of the district are in any strict sense legislative powers.

A hearing is involved, a trial upon certain issues made by the petition, and objections thereto, and certain findings must be made by the court of common pleas in that behalf, all of which are essentially judicial in their nature. But it is claimed that the appointment of the directors and appraisers and their functions are legislative in character and amount to a delegation of legislative power.

It is difficult to see how this is any more a delegation of legislative power than the appointment of receivers and the various orders of court authorizing them to continue a going concern, or to sell the same and distribute the proceeds, or to appoint appraisers in any given case, or any of the numerous boards that have heretofore been appointed by courts for the purpose of carrying out the substantial provisions of various statutory proceedings. But suppose that the powers so conferred are quasi-legislative; it must be conceded they are also quasi-administrative and quasi-judicial, and in such cases where the twilight zone of distinction prevails, it has always been regarded as the right and duty of the legislature to determine the nature of the function exercised and the body that should exercise it.

In this case they have conferred that power upon the court of common pleas. Whether that was wise or no, is not important in this case. That should have been addressed to the legislative body that enacted the law.

We are satisfied that there is no constitutional prohibition against it.

Innumerable instances are available in our jurisprudence with reference to public improvements, such as turnpike roads, ditches and the like, where the legislature has delegated to township trustees, county commissioners, or other bodies, to lay out and organize districts for the construction

of such improvement and for taxing or assessing the lands benefited thereby, and such enactments have been almost uniformly held valid; that is, that they were not a delegation of legislative power as prohibited by the constitution.

Manifestly, the legislature itself could not do the work contemplated by this statute. It would be impracticable. The only other alternative would be that the improvement must fail, that the general welfare must suffer because nobody but the legislature could exercise the power.

We find in this act no violation of the constitution in this respect.

Again it is urged that the conservancy act violates the home-rule provisions of the constitution.

Suffice it to say that the home-rule provisions of the constitution apply to municipalities, townships, counties and the like and like political subdivisions that existed before we had States and constitutions. The doctrine in no wise applies to the creation of drainage or conservation districts where the power to be exercised is peculiarly a State power, the sovereign police power. It has always been recognized as peculiarly the function of the States.

The statute provides for the organization of a district that may include any number of municipalities and townships and counties; how then could it be said that any one of these should be vested with the power to administer the law beyond its own jurisdiction and that that would be necessary under its home-rule right? It is inconceivable. The home-rule doctrine, so far as it is applicable, is itself conserved by permitting the officers of the district to administer the affairs of the district in the organization thereof, the construction of the improvement and the maintenance thereof.

Many other objections are noted in the numerous briefs, but in the main they are not germane to a judicial inquiry. They should have been addressed to the legislature at the time the statute was pending. This court has nothing to

do with the wisdom or unwisdom of the policy involved in the statute. Its duty is ended when it determines the questions as to whether or not any Federal or State constitutional provision has been violated, and whether or not the proceedings under the statute have been regular and are agreeable thereto. So far, what has been said has had special reference to what has become known as the "Dayton Conservancy District,' and the judgment of the court of appeals is therefore affirmed.

The second case, No. 14829, The State of Ohio on the Relation of Robert P. Duncan, Prosecuting Attorney of Franklin County, Ohio, plaintiff in error, *vs.* The Franklin County Conservancy District, defendant in error, involves substantially the same questions as in No. 14834, the Dayton case.